

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

MCI Metro Access Transmission Services, Inc.,)
MCI WorldCom Communications, Inc.,)
Intermedia Communications Inc.)
)
Petition for Arbitration of Interconnection)
Rates, Terms and Conditions and Related)
Arrangements with Illinois Bell Telephone)
Company Pursuant to Section 252(b) of the)
Telecommunications Act of 1996.)

Docket No. 04-0469

**POSITION STATEMENTS OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

Matthew L. Harvey
Michael J. Lannon
Sean R. Brady
Brandy D.B. Brown
Eric M. Madiar
Stefanie R. Glover
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

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*Counsel for the Staff of the
Illinois Commerce Commission*

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I. INTRODUCTION

The Staff, pursuant to the Administrative Law Judge’s (“ALJ’s”) Notice and Order, dated September 1, 2004 (“Each party shall file a separate document containing position statements for every issue that it is contesting on or before September 27, 2004.”), provides the following Staff final positions (in some issues, the Staff position evolved due to subsequent filings by the parties) on the open issues the Staff addressed.

II. THE STAFF’S POSITION ON CERTAIN OPEN ISSUES PRESENTED FOR ARBITRATION

A. Issues Resolved by the FCC’s UNE Interim Requirements Order

Staff notes that, in its *UNE Interim Requirements Order*, the FCC ordered that:

Until the earlier of (1) six months after Federal Register publication of this Order or (2) the effective date of the final unbundling rules adopted by the Commission in the proceeding opened by the appended *Notice*, the interim approach described above will govern. Incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (e.g., an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.

Staff IB at 6-7, *citing Order and Notice of Proposed Rulemaking, ¶¶29, In the Matter of Unbundled Access to Network Elements / Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC No. 04-179, WC Docket No. 04-313, CC Docket No. 01-338 (August 20, 2004) (“UNE Interim Requirements Order”)

Thus, Staff contends that, as a practical matter, any disputes over the rates, terms, and conditions for unbundled access to switching, enterprise market loops, and dedicated transport should be resolved by simply ordering the parties to comply with the same rates, terms and conditions that applied under their interconnection agreements or tariffs, UNE Interim Requirements Order, ¶ 1, n. 5, as of June 15, 2004. Staff IB at 7.

The Staff further observes that the FCC’s interim freeze also applies to elements that must be made available when switching is made available. Staff IB at 7 citing UNE Interim Requirements Order, ¶1, n.3. Staff states that these elements include, but may not be limited to, CNAM databases and/or information, LIDB databases and/or information, toll free databases and/or information, SS7 systems, shared transport, and Operator Services and Directory Assistance (OS/DA). Staff IB at 7. Staff contends that the FCC has specified that each of these elements must be made available when unbundled local switching is made available. Id.

Since, in Staff’s view, the FCC has essentially frozen the parties’ contractual and tariff obligations with regard to certain issues as those obligations existed on June 15, 2004, this “freeze” has effectively eliminated several issues from consideration, including:

- CNAM: SBC 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, SBC 2
- SBC 1, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, CNAM 1
- SS7: 1, 2, 3
- UNE: SBC 1, 33, 37, SBC 2, 47, 48, 49, SBC 3, 51, 53, SBC 4, 55, 56, 57, 58, 59, 61, 62, 63
- 800: SBC 1, 1, 2, 3
- OS: 1
- DA: 1
- Price Schedule: 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32

Staff Ex. 6.0 at 70-71.

Staff notes that the *Interim Order* did not eliminate all issues related to unbundled local switching related items; there are still open issues with respect to the provision of these items as they relate to enterprise switching. Staff IB at 8. The FCC specified that rates, terms, and conditions are, with limited exceptions, frozen with respect to their relationship to Section 251 unbundled

mass market local switching. Id. Staff notes that there was no similar freeze with respect to Section 251 unbundled enterprise local switching. Id. However, Staff contends that this is because enterprise switching is no longer on the FCC's list of Section 251 UNEs. Id., citing *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, ¶451, In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers / Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 / Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC No. 03-36, CC Docket Nos. 96-98, 98-147, 01-338 (August 21, 2003) (hereafter "Triennial Review Order" or "TRO"). Therefore, since SBC does not need to provide unbundled enterprise local switching as a Section 251 UNE, the Staff takes the position that SBC does not need to provide as Section 251 UNEs the switching related items that go hand in hand, according to the FCC, with Section 251 unbundled enterprise local switching. Staff IB at 8-9

Furthermore, the Staff notes that the Commission's *Section 13-801 Implementation Order*, see *Order, Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act*, ICC Docket No. 01-0614 (June 11, 2002) did not address whether Section 13-801 imposes a state law requirement that SBC provide switch related items that in connection with its provision of unbundled enterprise local switching. Staff IB at 8-9. Neither party has offered a position that addresses the provisioning of these elements in the context of their use in conjunction with mass market switching and enterprise switching. Id. Nor, Staff notes, has either party offered a position or support that would further explain how differences in state and federal law would impact differences in provisioning. Id.

The Staff therefore recommends that the Commission therefore require SBC to continue to offer Section 251 unbundled mass market local switching, enterprise loops, and dedicated transport, as it did in the interconnection agreement between the parties or tariffs relied on by the parties as of June 15, 2004. Staff IB at 9. Insofar as they are used in conjunction with Section 251 unbundled mass market local switching, the Commission also should require SBC to continue to offer Section 251 CNAM databases and/or information, LIDB databases and/or information, toll free databases and/or information, SS7 systems, shared transport, and OS/DA to MCI as it did in the interconnection agreement between the parties or tariffs relied on by the parties as of June 15, 2004. Id. Insofar as they are used in conjunction with Section 251 unbundled enterprise local switching, the Commission should *not* require SBC to continue to offer Section 251 CNAM databases and/or information, LIDB databases and/or information, toll free databases and/or information, SS7 systems, shared transport, and OS/DA to MCI. Id. at 9-10.

B. The ICA Should Include Clarifying Language Regarding SBC's Obligations Under Both Federal Law (Sections 252 and 271) And State Law

SBC argues that the Commission should eliminate from the ICA any terms and conditions for unbundled access to mass-market switching, enterprise market loops, and dedicated transport because “federal law *precludes* the adoption of such terms and conditions.” SBC IB at 2 (emphasis in original). SBC explains that the FCC, in the *UNE Interim Requirements Order*, “forecloses the implementation and propagation of the vacated rules’ that had required incumbents to provide unbundled access to those network elements.” SBC IB at 3, *citing UNE Interim Requirements Order*, ¶ 23. The Staff agrees with SBC’s position as far as it concerns federal law under Sections 251 and 252 of TA 96, but disagrees strenuously with respect to SBC’s obligations under Section 271 of TA 96 and under applicable state law. Staff RB, at 4—5.

SBC’s position appears to stem from its erroneous belief that its obligation to provide elements resides solely in federal law. SBC IB at 6-10. SBC summarizes its position as follows:

The implications of *USTA II* and the *Interim Order* for this arbitration are straightforward and inescapable. Whatever right MCI may have to continue to access mass market switching, enterprise market loops, and dedicated transport for the interim period (while the interim requirements remain in effect), it cannot seek arbitration of *new* contract provisions addressing those network elements. Thus, the *Interim Order* and *USTA II* moot all contract language disputes regarding the provision of these network elements. SBC IB at 7 (emphasis in original).

The conclusions SBC draws from *USTA II*¹ and the *UNE Interim Requirements Order* are untenable. The DC Circuit Court’s decision in *USTA II* and the FCC’s *UNE Interim Requirements Order* only addressed an ILECs’ unbundling obligations under the FCC’s rules. SBC, however, has obligations to provide certain network elements under *state law*. Neither *USTA II* nor the *UNE Interim Requirements Order* addressed an ILECs’ state law obligations to provide certain network elements. SBC’s argument here is nothing more than a preemption argument. Staff RB, at 5.

SBC asserts that the *UNE Interim Requirements Order* “makes it clear that the interim ‘freeze’ only applies to contracts in existence on June 15, 2004; therefore, it would not be appropriate to incorporate contract provisions into a new agreement to implement the *Interim Order*.” SBC IB at 10-11.

¹ U.S. Telecom Ass’n v. FCC, 359 F.3d 554; 2004 U.S. App. Lexis 3960 (D.C. Cir. 2004) (“*USTA II*”)

Staff agrees with SBC that the *UNE Interim Requirements Order* effectively “froze” SBC’s *obligations* to provide certain network elements to MCI as existed under the effective ICA between the parties on June 15, 2004. However, there is no language in the FCC’s *UNE Interim Requirements Order* indicating it would somehow be “inappropriate” to incorporate by reference or extrapolate (from the June 15, 2004, ICA) into the instant ICA the terms and conditions under which SBC will make available dedicated transport, enterprise loops and mass market switching during the roughly 6 month interim period. SBC does not point to any such language in the *UNE Interim Requirements Order*. Staff RB, at 6.

To the contrary, the FCC “emphasize[d] at the outset that the twelve-month transition described herein is essential to the health of the telecommunications market and the protection of consumers.” UNE Interim Requirements Order, ¶ 17. The FCC further stated that:

Our plan to issue revised unbundling rules on an expedited basis does not alone provide the requisite market stability in the near term. The absence of clear rules, as stated above, threatens to disrupt the business plans of competitive carriers and their service to millions of customers that rely on competitive service offerings. This is a risk to the public interest too great to bear unheeded. The public interest is best served by clarity with regard to the rates, terms and conditions under which network elements must be made available to requesting carriers. UNE Interim Requirements Order, ¶ 18 (internal citations omitted).

Making explicit in this ICA the rates, terms and conditions under which these network elements will be available to MCI during the interim period is perfectly consistent with the FCC’s stated intent to avoid market disruption. Staff RB, at 6. The Commission thus should reject SBC’s argument that federal law precludes contract language regarding the “frozen” network elements to be included in the instant ICA. Id.

At the same time, Staff recommends that the Commission adopt SBC’s basic proposal to set forth in a rider to the ICA its obligations under federal law to provide the elements addressed in the *UNE Interim Requirements Order* during the interim period. Staff RB, at 7. This proposal is fundamentally sound. The Staff, however, would object to any language in the Rider characterizing the provisions of the Rider as fully articulating SBC’s obligations under federal law if the Rider does not reference SBC’s obligations under Section 271 of TA 96. Staff also notes that SBC’s obligations under state law concerning these elements, specifically PUA Section 13-801 obligations – should be set forth not in the proposed rider but rather in the ICA itself. Finally, Staff recommends, essentially as a practical matter of administrative convenience, that the Rider set

forth SBC's obligations to provide these three elements during the second six-month transition period as these obligations are currently envisioned by the FCC.

1. Federal Preemption of SBC State Law Obligations

SBC objects to MCI's proposed language that would require SBC to comply with state law. SBC IB at 14-24. In part, SBC argues that: "to the extent that SBC is already subject to unbundling requirements under state law, SBC is already legally bound to comply with those requirements under state law so long as they are in force. There is simply no need to repeat that fact here." SBC IB at 23. The Staff agrees with SBC that "it is already bound to comply with those requirements so long as they are in force". However, the Staff also believes it is essential that the ICA specifically set forth those obligations explicitly and clearly. Under SBC's faulty reasoning, both parties would in effect proclaim that they would fulfill their legal obligations and the other party would simply trust that this would occur. Obviously, the Commission must reject such reasoning. Staff RB, at 7-8.

In an apparent effort to support its position regarding state law obligations, SBC mischaracterizes Staff's testimony and position on these issues. For instance, SBC asserts:

Staff Witness Hoagg recognizes the tension between state-law unbundling and federal law, but suggests that the Commission might avoid conflict by ordering state-law unbundling at a price based on some undefined "cost" standard rather than at the federal "TELRIC" price. Staff Ex. 1.0 at 14. Even MCI is unwilling to adopt Mr. Hoagg's fiction. SBC IB at 23.

Mr. Hoagg, however, never recognized or testified to "tension" between state and federal law. Rather, Staff's position is that Section 13-801 unbundling requirements, properly reflected in this ICA, are wholly consistent with federal requirements. Staff RB, at 7-8. First, Illinois state unbundling requirements need not be identical to federal requirements to be wholly consistent with federal requirements. Order, ¶41, Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614 (June 11, 2002) ("Section 13-801 Implementation Order"). Second, as Mr. Hoagg pointed out, quite appropriately, "any network element 'declassified' as Section 251 elements should be priced at cost-based (but non-TELRIC) rates." Staff Ex. 1.0 at 14. Moreover, as Mr. Hoagg made clear, what SBC refers to as "some undefined cost standard" is the standard contained in Section 13-801 of the PUA. Staff Ex. 1.0, at 14, n. 16.

SBC further characterizes Mr. Hoagg's testimony on the pricing requirements of Section 13-801 as "fiction". It must follow then that SBC would also characterize its federal Section 271 pricing obligations regarding "declassified" elements pursuant to Sections 201 and 202 of the Federal

Communications Act (see *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, ¶¶ 656, 657, In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers / Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 / Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC No. 03-36, CC Docket Nos. 96-98, 98-147, 01-338 (August 21, 2003) (hereafter “Triennial Review Order” or “TRO”), as a “fiction.” Staff RB, at 8-9. As Mr. Hoagg aptly points out, the pricing standards for declassified elements under federal law and elements SBC is obligated to provide under state law are entirely consistent. The Commission should disregard SBC’s allegations that “cost based” pricing standards are a fiction espoused by Staff. Rather, they are clearly the defined standard under both relevant provisions of state law and the FCC’s Orders implementing federal law, which was also upheld by the USTA II decision. Staff Ex 1.0 (Hoagg) at 12-14.

SBC further argues that:

Moreover, TELRIC is not the *sine qua non* of pricing under federal law. TA96 (like section 13-801) does not refer to TELRIC, it refers to “cost.” 47 U.S.C. § 252(d)(1). TELRIC is just *one* permissible approach to assessing “cost” under the federal Act, and even now the FCC is in the midst of rethinking that approach. SBC IB at 24.

In advancing this position, SBC completely ignores the relevant provisions of the TRO that clearly underpin the Staff’s position and Mr. Hoagg’s testimony on this issue. See Staff RB, at 9-10; Staff Ex. 1.0 (Hoagg) at 12-14 (“The FCC’s TRO makes clear that a key distinction between certain separate Section 251 and Section 271 federal obligations lies in pricing.”). Far from arguing that a state can evade the federal impairment standard due to “a mere difference in price” (SBC IB at 24), Mr. Hoagg actually testified that “[t]he FCC found that Section 251 ‘impairment’ and TELRIC pricing is directly linked,” and then cited to the relevant portions of the TRO that linked the impairment standard with pricing.² Staff Ex. 1.0 (Hoagg), at 12-14, *citing* TRO, ¶¶656, 657 (e.g., “Where there is no impairment under Section 251 and a network element is no longer subject to unbundling, we look to Section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist elements.”).

SBC further attempts to obfuscate its real issue – potential preemption – by also arguing that:

² In the Staff’s view, SBC’s argument against Staff witness Mr. Hoagg’s position on pricing under Section 13-801, would also lead the Staff to logically conclude that SBC also oppose the FCC’s dictates regarding pricing on the “declassified” elements under Section 251 but that SBC is obligated to provide under Section 271, which, as Mr. Hoagg notes, is specifically analogous to Mr. Hoagg’s position on the Section 13-801 elements. See Staff Ex. 1.0 (Hoagg), at 12-14.

The question presented by MCI and Mr. Hoagg *here* is whether the Commission should either (i) *expand* its holding in Docket No. 01-0614 and order unbundling of individual network elements – as opposed to the combinations addressed in that docket – without regard to federal law, or (ii) *transplant* its holding on existing platform combinations from Docket No. 01-0614 into the agreement here. Plainly, this is not the time or place for either action. This is an arbitration conducted to implement federal law. SBC IB at 17 (emphasis added).

The Staff again agrees with SBC that this is an arbitration brought under federal law, not something other than a Section 252 arbitration. SBC is incorrect, however, in implying that this Commission may only consider select provisions of federal law (Sections 251 and 252) while ignoring relevant provisions of state law (Section 13-801) and other relevant provisions of federal law (Section 271) in this arbitration. Staff RB, at 10-11.

The Staff agrees with SBC that this is not the place for the Commission to reconsider its prior decision in the original *Section 13-801 Implementation Proceeding*, particularly since the Commission has recently re-opened its *Section 13-801 Implementation Order* to specifically reconsider its prior decision in light of the recent changes in the federal law. Ironically, however, SBC itself seems bent on re-litigating the original *Section 13-801 Implementation Order* here in this arbitration by arguing that the Commission may not even consider its *Section 13-801 Implementation Order* or, in effect, any other applicable provision of state law. Here, SBC collaterally attacks many of the conclusions the Commission reached in its *Section 13-801 Implementation Order*. Clearly, this is not an appropriate proceeding for SBC to attack the Commission's decisions in a prior Commission order. See MCI Telecommunications Corporation: Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company, Docket No. 96-AB-006, 1996 Ill. PUC Lexis 706, at *88-*91 (December 17, 1996) ("*MCI Arbitration Order*") (The Commission affirmed the Administrative Law Judge's ruling to grant Ameritech's motion to strike certain portions of MCI's testimony that launched a collateral attack on a prior Commission order. In sustaining the ALJ, the Commission stated, "[t]o the extent that MCI may be dissatisfied with [the Commission's prior] decision in [Docket Nos. 95-0458 and 95-0531], the appropriate approach [for MCI] would have been to file an application for rehearing and an appeal upon denial of that application."). SBC's arguments in this regard amount to another variant of its preemption argument. Staff RB, at 11-12.

SBC's inaccurate characterizations of Staff's position are, as noted above, essentially a preemption argument. SBC is free to make any federal preemption argument it cares to make regarding all or part of Section 13-801, but it is totally unavailing to make such arguments *before this Commission*. As SBC is fully

aware, the Commission is a creature of state law, and bound by the acts of the General Assembly. City of Chicago v. Illinois Commerce Commission, 79 Ill. 2d 213, 217-18 (1980); Illinois Bell Telephone Co. v. Illinois Commerce Commission, 203 Ill. App. 3d 424, 438 (1990). Staff RB, at 12.

To the extent that SBC believes that the General Assembly has acted in a manner that is preempted by federal law, it has appropriate remedies available to it. For example, SBC may petition the FCC under Section 253(d) of TA 96, to preempt all or part of Section 13-801, on the grounds that it violates, or is inconsistent with, the federal Act. 47 U.S.C. 253(d). Moreover, the Commission has afforded SBC a forum to make many of these arguments by reopening its *Section 13-801 Implementation Order*. Staff RB, at 12.

SBC cannot, however, raise a preemption argument here, in this proceeding. Staff RB, at 12-13. The Commission has no authority to declare an Act of the Illinois General Assembly preempted. The Commission must reject SBC's argument that federal law preempts the application of Section 13-801, even if it determines that such arguments have merit. As even SBC acknowledges (SBC IB at 16-17), the Commission will address many of the issues that SBC attacks in the Commission's prior decision in the reopened *Section 13-801 Implementation Proceeding*. That is the proper proceeding for SBC to address the issues it raises regarding Section 13-801 of the PUA, not this arbitration. Until such time as the Commission finishes the reopened *Section 13-801 Implementation Proceeding*, the Commission's prior determinations reached in the Section 13-801 Implementation Order, remain in effect, as SBC acknowledges. SBC IB at 17.

SBC further argues that since this arbitration is brought under Section 252(b) of TA 96 and, thus, the Commission should only consider whether its resolution of issues meet the requirements of Section 251. SBC IB at 24-25. In making this argument, SBC ignores other relevant provisions of Section 252. Section 252(e)(3), for example, provides, in relevant part, the following:

[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. 47 U.S.C. § 252(e)(3).

Section 252(e)(3) expressly provides that this Commission *may* establish and enforce state law requirements in reaching its determinations in a Section 252 arbitration. In fact, under the General Assembly's express dictates to the Commission in Section 13-801, it *must*.³ Staff RB, at 13.

³ See e.g., 13-801(a) ("This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the [FCC]"). 220 ILCS 5/13-801.

The Commission has repeatedly reached precisely this conclusion. For example, in its *XO Arbitration Decision*, the Commission addressed this very issue, finding that:

This state has also established unbundling requirements, characterized in Section 13-801 of the Act as ‘additional’ to federal unbundling requirements. When the pertinent ILEC is subject to an alternative regulation plan under Section 13-506.1 of the Act, as SBC is, such additional obligations may exceed or be more stringent than Section 251 obligations. *Id.* We have held that we lack authority to declare that Section 13-801 is preempted by federal authority, insofar as that statute authorizes unbundling in excess of federal requirements. Docket 01-0614, Order, June 11, 2002, ¶ 42. The FCC does have the power to preempt, as subsection 13-801(a) expressly acknowledges. That power is codified in Section 253(d), and the FCC observed in the TRO that ‘[p]arties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may’ request preemption under that section. TRO ¶ 195. *XO Arbitration Decision* at 48 (emphasis in the original).

In summary, SBC’s preemption arguments lack merit and cannot, in any case, properly be advanced in this proceeding. Staff RB, at 14. The Commission should therefore reject SBC’s preemption arguments, regardless of the guise in which they are clothed.

2. The Staff’s Position Does Not Recommend Implementing Vacated FCC Rules Or Rates

SBC argues that: “the Interim Order expressly forecloses the implementation and propagation of the vacated rules that had required incumbents to provide unbundled access to those network elements.” SBC IB at 6. SBC dedicates considerable effort in its Initial Brief to argue that this Commission is precluded from adopting any ICA language regarding SBC’s obligations to provide elements, either frozen by the FCC in the *UNE Interim Requirements Order* or declassified by the FCC in the TRO (and left undisturbed by the *USTA II* decision). SBC, however, fails to acknowledge its state law obligations to provide such elements or its Section 271 obligation to provide certain elements. As noted above, neither the FCC in its *UNE Interim Requirements Order* nor the DC Circuit Court in *USTA II* addressed SBC’s state law and Section 271 obligations. Staff RB, at 14.

SBC has state law obligations to provide certain elements and combinations of elements under Section 13-801. SBC also has Section 271 obligations to provide certain elements independent of its Section 251 and 252

obligations.⁴ The Staff continues to recommend that the Commission to adopt clarifying language regarding these obligations to offer certain elements and combinations. Staff RB, at 14-15.

SBC also opposes clarifying language regarding SBC's obligations under the FCC's Interim and Transitional periods on the grounds that such language would amount to *new* ICA language implementing vacated FCC rules. SBC IB at 6-7. The FCC, however, addressing the Interim and Transitional periods, found that: "Our approach here is, in several meaningful respects, different from a mere reinstatement of our vacated rules." UNE Interim Requirements Order, ¶ 23. Staff RB, at 15. Similarly, Commission adoption of language clarifying SBC's obligations during the Interim and Transitional periods differs from merely reinstating the vacated rules.

3. Future Declassifications

SBC contends that Staff's recommendation that the ICA include clarifying language regarding future "declassifications" is "entirely unnecessary". SBC IB at 13. SBC's position, however, does not properly account for its obligations under Section 271 of TA 96 and its obligations under state law, including Section 13-801. Staff RB, at 15.

The Staff recommends that the Commission adopt language regarding the declassifications of the elements addressed in the FCC *UNE Interim Requirements Order*. SBC's continuing obligations concerning these elements under Section 271 and Section 13-801 of the PUA should also be set forth in the ICA. Doing so will accomplish the FCC's primary intentions regarding its interim and transitional periods – *i.e.*, to provide clarity regarding an ILECs' obligations to provide these elements. UNE Interim Requirements Order, ¶ 18 ("The public interest is best served by clarity with regard to the rates, terms and conditions under which network elements must be made available to requesting carriers."). Staff RB, at 15-16.

4. Transition Period

SBC argues that the Commission should not adopt language in the instant ICA addressing the FCC's "proposed" requirements regarding the 6-month Transitional period to follow the Interim period. SBC IB at 11-13. In support of its position, SBC argues that "[t]he Commission's duty in this arbitration is to "meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." SBC IB at 11. SBC, however, ignores this Commission's duty to resolve all open issues properly brought before it in this

⁴ Regarding SBC's Section 271 obligations, as discussed in more detail below, the FCC found in the TRO that: "[T]he requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." TRO, ¶7.

proceeding. See e.g., 47 U.S.C. § 252(b)(4)(C) (“The State commission shall resolve each issue set forth in the petition and response . . .[.]”). Staff RB, at 16.

Moreover, the Commission has a duty to resolve all open issues negotiated by the parties and properly raised in MCI’s Petition for Arbitration or in SBC’s Response to the Petition for Arbitration. Coserv Limited Liability Corp. v. Southwestern Bell Tel. Co., 350 F.2d 482, 487 (5th Cir. 2003) (“Coserv”)(“Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that any issue left open after unsuccessful negotiation would be subject to arbitration by the PUC.”). Id.

SBC also fails to point to any FCC language in the *UNE Interim Requirements Order* prohibiting the Commission from adopting clarifying language addressing the FCC’s proposed “grandfather” requirements for the Transition period. The FCC has made itself clear concerning the “grandfathering” of existing CLEC customers during the transition period. UNE Interim Requirements Order, ¶ 29. From an administrative standpoint, it is most sensible that the Rider proposed by SBC reflect these intended obligations. Staff RB, at 16-17. It is a simple matter to draft such language in a manner to ensure that it would be rendered null and void if the FCC ultimately does not adopt the grandfathering requirements it currently intends.

5. Section 271 Obligations

SBC argues that: “As an alternative to their state-law proposal, MCI and Mr. Hoagg suggest that the Commission could also require unbundling pursuant to the federal ‘checklist’ of Section 271.” SBC IB, at 24. SBC points out that this is “not a proceeding under section 271” proceeding but, rather, “an arbitration under sections 251 and 252. Id.”

SBC again mischaracterizes Staff testimony. The Staff never suggested that the Commission could “require” unbundling pursuant to Section 271 of TA96. Rather, Staff noted that “271 unbundling” by SBC is required, and that these requirements are comparable in significant respects to the unbundling required under Section 13-801 of the PUA. Staff RB, at 17. Staff agrees with SBC that it is the FCC and not the ICC that will enforce the unbundling obligations of Section 271. At the same time, Staff disagrees with SBC’s contentions that the Commission has no authority to implement Illinois PUA unbundling obligations in this “251-252” arbitration. Among other things, the ICC may do so pursuant to Section 252(e) of the 96 Act. Id.

SBC argues that the Commission has no jurisdiction under Section 271 to enforce any Section 271 obligations in this arbitration, arguing that Section 271 of TA 96 confers on the Commission no “rulemaking authority under section 271 to enforce that provision.” SBC IB at 24- 25. Staff does not disagree with these specific points raised by SBC. Staff RB, at 18.

In its recent *XO Arbitration Decision*, the Commission addressed this very issue. The Commission found:

Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis. [fn] “[T]he requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.” TRO, ¶ 653. However, the FCC also held that Section 271 “does not require TELRIC pricing” for elements unbundled pursuant to that statute. TRO ¶ 659. Instead, prices for Section 271 UNEs must be just, reasonable and non-discriminatory, per Sections 201 and 201 of the Federal Act. TRO ¶ 656. XO Arbitration Decision at 47-48 (footnote omitted)

The Commission explicitly directed the parties as follows:

Language relieving SBC of its obligation to unbundled elements under Section 271 is prohibited; correspondingly, language authorizing such unbundling (e.g., XO proposed Section 3.1.4.1) is permissible. Language requiring SBC to offer 271 UNEs, qua 271 UNEs, at TELRIC prices, is prohibited; correspondingly, language authorizing SBC to offer 271, qua 271 UNEs, at prices determined per the criteria Sections 201 and 201 of the Federal Act is permissible. Id.

In accordance with this, the Staff recommends that the Commission require that this ICA properly reflect and account for SBC’s obligations under Section 271. Staff RB, at 18.

C. Issues Not Resolved by the FCC’s UNE Interim Requirements Order

1. GT&C Issue 7

Statement of Issue: How long should the Term of the Agreement be?

The Staff recommends that the Commission adopt the three-year term proposed by SBC and reject MCI’s proposed five-year term. Staff IB at 10-11; Staff Ex. 3.0 (Omoniyi) at 6-7. In support of its recommendation, Staff witness A. Olusanjo Omoniyi, testified that a three-year term not only provides some certainty to both carriers, but it also allows the carriers to develop long-term business plans with reasonable assurance. Id. at 6; Staff IB at 10. In addition, as the telecommunications landscape continues to change in technology and regulation, the carriers are better situated to address those changes in a three-

year term versus a five-year term. Id. This would dispense with the carriers having to negotiate multiple amendments in a “piecemeal, patchwork manner.” Id. While a five-year term is of a longer duration, it may hamper the parties’ ability to address and efficiently respond to changing market conditions. Id. Lastly, the Commission will also be able to respond more reasonable to the ever-evolving telecommunications marketplace if the parties adopt a three-year term. Id. The potential costs savings that may occur when an arbitration approval request is brought before the Commission every five years, instead of every three years, is outweighed by the Commission’s ability to “promptly respond to the market conditions” after a three-year term. Staff Ex. 3.0 (Omoniyi) at 7; Staff IB at 10. As market conditions in the telecommunications industry continue in “a state of flux”, it would be more prudent, and we therefore recommend, for the Commission to adopt and accept the three-year term proposed by SBC. Staff Ex. 3.0 (Omoniyi) at 7; Staff IB at 11.

2. GT & C Issues 8 and 9

Statement of Issue: 8a) (SBC) What terms and conditions should apply to the contract after expiration, but before a successor ICA has become effective?

8b) (MCI) If the parties are negotiating a successor agreement, should either party be entitled to terminate this agreement before the successor agreement becomes effective?

9) What terms and conditions should apply to the contract after expiration, but before a successor interconnection agreement has become effective?

The Staff recommends that the interconnection agreement remain in effect after the termination date; however, if a party sends notification of termination, the agreement should expire after a ten-month period unless the Commission approves a successor agreement. Staff IB at 11-12; Staff Ex. 3.0 (Omoniyi) at 10-13. The parties agree, and Staff supports, that the agreement should continue to be in force and effect until a new one is in place. Staff IB at 11; Staff Ex. 3.0 (Omoniyi) at 10. By allowing the agreement to continue, the parties can thus focus on providing “services to customers without disrupting rates, terms and conditions for those services.” Id. Staff likewise recommends that the Commission reject SBC’s proposal to continue the term of the agreement on a month-to-month basis once the initial term expires. Staff IB at 11; Staff Ex. 3.0 (Omoniyi) at 10-11.

The Staff has a number of concerns with an existing agreement that has no definite deadline. First, Staff believes the lack of a deadline will be little incentive for a party in a stronger negotiating position to conclude negotiations.

Staff IB at 11-12; Staff Ex. 3.0 at 11. This could cause the agreement to continue even when the terms, rates and conditions may be inappropriate. Staff IB at 12; Staff Ex. 3.0 at 11. Second, Staff believes a deadline is important for incorporating changes to products and services that have occurred as a result of technological changes as well as changes in the business needs of carriers. Id. Continuing without a deadline may result in interconnection agreements whose terms, rates and conditions may be one-sided and outdated, and that “may not be in the carriers’ interest or necessarily in the public interest.” Id. Third, setting a definite deadline prevents, in Staff’s view, unfair consequences from happening to a “non-withdrawing party” caused by a party engaging in repetitive negotiations. Staff IB at 12; Staff Ex. 3.0 at 12. Such a practice exhausts, in Staff’s opinion, both the Commission’s and the carrier’s resources, while at the same time circumvents the Commission’s goal that parties take “necessary, appropriate and good-faith steps to secure a successor agreement within a reasonable period of time.” Id. Finally, Staff takes the view that rejecting SBC’s month-to-month proposal is in line with ensuring marketplace certainty and guiding carriers as they implement long-term business plans. Id. Again, setting a deadline will, according to Staff, allow the carriers to address terms, rates and conditions regarding the numerous services and products contained within the interconnection agreement without putting resources at risk. Id. In summary, Staff recommends that the Commission should adopt Staff’s recommendation to discontinue agreements that continue beyond 10 months once one of the parties has been served a notice of termination, unless otherwise informing the Commission that the parties have agreed to continue to enforce the agreement’s terms, rates and conditions. Id.

3. GT & C Issue 10

Statement of Issue: 10a) MCI - Which party’s deposit clause should be included in the Agreement?

10b) SBC - With the instability in the current telecommunications industry is it reasonable for SBC Illinois to require a deposit from parties with a proven history of late payments?

Staff contends that, because MCI raises some legitimate concerns regarding the unilateral action allowed SBC in its deposit proposal, Staff recommends the Commission adopt SBC’s proposal with some modifications. Staff IB at 13; Staff Ex. 3.0 at 18. It appears to Staff that both parties understand and accept that deposit requirements are reasonable. Id. However, Staff is of the view that the deposit requirements and advance payment demands imposed upon MCI should not be set at disproportionately high levels as may result from SBC’s proposal. Id. It is Staff’s understanding that SBC primarily bases its deposit conditions on its prior history and relationship with MCI. Id. Staff further understands that SBC experienced significant financial losses due to MCI’s bankruptcy and now seeks to establish safeguards in the form of deposits and

advance payments to re-establish a new relationship post-bankruptcy. Staff IB at 13; Staff Ex. 3.0 at 19. In addition, Staff concurs in the proposition that SBC must establish deposit standards that will not negatively impact it if and when other carriers seek to Opt-in to the agreement. Id. Staff asserts that such protection is particularly important in scenarios where the relationship between SBC and the requesting carrier are vastly different, and thereby potentially leading to discriminatory outcomes. Id.

To accommodate both parties, Staff recommends the Commission to adopt the following:

1. Accept the four bases outlined in Sections 9.2.1 to 9.2.4 proposed by both parties that could trigger a demand assurance of payments;
2. Accept Sections 9.3.1 and 9.3.2 of Section 9.3 as proposed regarding forms of assurance of payment; and,
3. Reject 9.3.3 because it conflicts with Section 9.10 (9.3.3 requires MCI pay SBC three (3) months worth of billing, but 9.10 requires four (4) months even though deposit triggers are the same for both). SBC must be consistent regarding whether the requested deposit should be three (3) or four (4) months.

Staff IB at 13-14; Staff Ex. 3.0 at 19

The Staff presumes that SBC's "acceptance" of the Staff's recommendation to mean that SBC proposes to delete from the ICA, the 3 month payment requirement found in section 9.3.3 and retain the 4 month requirement contained in Section 9.10. Staff RB at 19-20.

4. GT & C Issue 11

Statement of Issue: What terms and conditions should apply in the event the Billed Party does not either pay or dispute its monthly charges?

When considering what terms and conditions should apply in the event the billed party neither pays nor disputes its monthly charges, Staff recommends that the Commission reject SBC's new standard billing dispute process. Staff IB at 14; Staff Ex. 3.0 at 22. Staff understands SBC is legitimately concerned with avoiding potential financial losses, and using disconnection as a tool in that effort is reasonable; however, SBC's proposal to funnel all related matters through this new process is, in Staff's view, unacceptable. Id. In Staff's opinion, SBC's approach inappropriately encapsulates a restrictive technical process within its attempt to form guidelines for MCI to comply with the terms and conditions of Section 10. Id. Staff takes the position that MCI should be afforded a prompt and efficient filing process to resolve complaints and billing disputes regardless of

the method employed. Id. SBC's proposal for lodging and logging disputes, as written, does not, as Staff sees it, provide MCI with such a method and, therefore, should be rejected. Id.

Staff recommends that SBC's proposed language that "failure to pay all or any portion of any amount required to be paid may be grounds for suspension or disconnection of resale services, network elements and collocation as provided for in this section", be accepted by the Commission. Staff IB at 14; Staff Ex. 3.0 at 23. Staff considers this language acceptable because SBC has also included qualifying language that clarifies for MCI the parameters for when SBC will and will not institute this clause. Id.

5. GT & C Issue 14

Statement of Issue: Which party's audit requirements should be included in the Agreement?

Staff recommends the Commission adopt MCI's primary proposal that the parties be permitted to audit each other twice a contract year. Staff IB at 15; Staff Ex. 3.0 at 26-27. However, because the successful implementation of this agreement relies heavily on financial obligations and bill payment compliance between the parties, Staff recommends that the audits be performed at six (6) month periods. Id. Requiring this audit proposal will ensure the parties an opportunity to address promptly any billing and/or recording errors at regular intervals. Id.

In addition, the Staff recommends that the Commission adopt a medium between SBC's and MCI's proposal regarding unaudited cycles. Staff IB at 15; Staff Ex. 3.0 at 27. Staff recommends that such time should be no more than a twelve (12) month period. Id. A non-auditing period of 24 months, as MCI suggests, would, in Staff's opinion, create a "danger of over-reliance on unaudited records. Staff IB at 15; Staff Ex. 3.0 at 28. An auditing period beyond Staff's suggested twelve months also could create a "voluminous set of records that is likely to result in costly auditing in terms of financial, time and assignment of more technical and human resources by the parties." Id.

Finally, Staff recommends that the parties' joint proposition to practice proprietary safeguards while auditing each other's books, records, data and other documents also be adopted by the Commission. Staff IB at 15; Staff Ex. 3.0 at 27.

6. NIM Issue 5

Statement of Issue: Which party's definition of Local Interconnection Trunk Group should be included in the Agreement?

Staff recommends that the Commission separate issues related to the definition of “Local Interconnection Trunk Groups” from the real disputes between parties regarding the proper, efficient, and lawful use of those trunks. Staff IB at 16; Staff Ex. 2.0 (Liu) at 40. The essential dispute, in Staff’s view, under NIM 5 is not a matter of definition; rather, it is whether to permit MCI to transit traffic and carry IXC traffic over the same trunk groups as other types of traffic. Staff IB at 16; Staff Ex. 2.0 at 39-40. Staff understands the parties to agree that Section 251(b)(1), ISP-bound traffic, and IntraLATA toll (delivered by SBC or MCI on behalf of their end user customers) can be carried over the same interconnection trunk groups. Staff IB at 16; Staff Ex. 2.0 (Liu) at 39. Staff recommends that the Commission separate the definitional disputes from the real disputes, and define Local Interconnection Trunk Groups (LITG) as trunk groups designated to exchange (between SBC and MCI) 251(b)(1) traffic, ISP-bound traffic, and IntraLATA toll traffic (delivered by SBC or MCI on behalf of their respective end users).⁵ Staff IB at 16; Staff Ex. 2.0 (Liu) at 40-41.

In the event that the Commission decides to permit transit and IXC-carried traffic to be carried over the same trunk groups as the three above-listed traffic types, Staff recommends that the Commission adopt the same definition (for Local Interconnection Trunk Groups) as Staff recommends above, but instruct parties to incorporate into their Agreement language stating that parties permit transit (or IXC-carried) traffic to be carried over Local Interconnection Trunk Groups. Id.

7. NIM Issue 9

Statement of Issue: Which party’s definition of points of interconnection should be included in the Agreement?

Staff contends that a point of interconnection (POI) is a physical point where parties’ networks meet and where parties’ deliver traffic to each other. Staff IB at 18; Staff Ex. 2.0 (Liu), at 50. Staff notes that the Commission has determined that each party is responsible for facilities on its side of the POI. Staff IB at 18, *citing AT&T Arbitration Decision* at 22. Staff sees is no reason why the Commission should depart from this decision. Staff IB at 18; Staff Ex. 2.0 (Liu), at 50. The Staff recommends that the following definition of POI be incorporated into parties’ Agreement:

A Point of Interconnection (POI) is a physical point on an incumbent LEC’s network where the incumbent LEC and the competing carrier’s networks meet and where traffic is delivered to each other.

⁵ Staff address issues related to whether the Commission should permit transit and IXC-carried traffic to be carried over the same trunk groups (i.e., Local Interconnection Trunk Groups) under Issues NIM 31 and NIM 19a, respectively. Staff Ex. 2.0 (Liu) at 40.

Staff IB at 18; Staff Ex. 2.0 (Liu), at 50.

Staff further recommends that the Commission require parties to incorporate the following language (which the Commission ordered in the AT&T Arbitration Decision) into their Agreement: Each party remains responsible for the facilities on its side of the POI. Staff IB at 18; Staff Ex. 2.0 at 51

8. NIM Issues 11 and 12

Statement of Issue: Should SBC's definitions of 251(b)(5) traffic and 251(b)(5)/IntraLATA traffic be included in the Appendix NIM of the Agreement?

Staff recommends that the Commission permit the use of the terms of "251(b)(5) traffic" and "251(b)(5)/IntraLATA traffic." Staff IB at 22; Staff Ex. 2.0 (Liu), at 72. The use of these terms is, Staff asserts, consistent with the FCC characterization of traffic. *Id.* Staff notes that the FCC has abandoned its official definition of "local traffic", citing unnecessary ambiguities created by the term "local traffic". Staff IB at 22, citing *Order on Remand and Report and Order*, ¶¶34-41, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131, CC Docket No. 96-98; 99-68 (April 27, 2001) ("ISP Remand Order"). Instead, notes the Staff, the FCC refers to traffic that is subject to reciprocal compensation under Section 251(b)(5) as 251(b)(5) traffic. *Id.* The use of "251(b)(5)" is consistent with the FCC's classification of jurisdictional traffic: "251(b)(5)," "ISP-bound," "IntraLATA" and "InterLATA." Staff IB at 22; Staff Ex. 2.0 (Liu), at 72. Therefore, the Staff recommends that the Commission adopt SBC's jurisdictional classification of traffic. *Id.*

9. NIM Issue 14

Statement of Issue: MCI - Should the Agreement include language reflecting the well-established legal principle that MCI is entitled to interconnect at a single POI per LATA?

SBC a) Where should MCI interconnect with MCI?

b) Should MCI be required to bear the costs of selecting a technically feasible but expensive form of interconnection such as a single POI or POIs outside the Tandem Serving Area?

Staff notes that in the *AT&T Arbitration Decision*, the Commission found that each carrier should be responsible, including financially, for providing all of the facilities and engineering on its respective side of each Point of Interconnection (POI). Staff IB at 19, *citing AT&T Arbitration Decision* at 28. The Staff recommends that the Commission decide this issue in the same way as it did in its *AT&T Arbitration Decision*. Staff IB at 19; Staff Ex. 2.0 (Liu), at 56.

Staff considers SBC's concerns regarding the costs of delivering traffic between the POI(s) and SBC's end users. Staff IB at 19; Staff Ex. 2.0 (Liu), at 56. Nonetheless, currently effective federal law not only allow MCI to interconnect at any technically feasible point on SBC's network, but also precludes SBC from charging MCI for transporting calls originating on SBC network to the POI(s). Id.

The Staff is of the opinion that the Commission should not permit MCI, at its own discretion, to dismantle any of the established interconnection arrangements with SBC. Staff IB at 19; Staff Ex. 2.0 (Liu), at 56. SBC, as well as MCI, has invested time and expense to establish the exiting multiple-point interconnection arrangement. Staff IB at 19; Staff Ex. 2.0_at 54-64. In particular, some interconnection arrangement such as Fiber Meet (design one) is co-financed and co-owned by MCI and SBC, with each party providing half of the required fiber strands and FOT. Permitting a CLEC to dismantle an established efficient interconnection arrangement or interconnection arrangement that is co-financed and co-owned by both SBC and MCI at MCI's own discretion is, absent any identifiable justification, bad policy and unjustifiable. Id. Accordingly, this issue should be resolved in favor of SBC. Id.

10. NIM Issue 15

Statement of Issue: MCI - Should MCI be permitted to elect LATA wide terminating interconnection?

SBC - Should MCI be required to trunk to every tandem in the LATA?

Tandem exhaust is, according to Staff, a significant problem in Illinois. Staff IB at 21; Staff Ex. 2.0 (Liu), at 69, 70. That said, Staff considers both SBC and MCI's positions to be extreme: SBC requires direct trunking to each tandem, and MCI claims its rights to a single POI. Staff IB at 21; Staff Ex. 2.0 at 70.

Staff recommends that the Commission adopt a middle-ground approach, consistent with its past rulings on direct trunking. Staff IB at 21; Staff Ex. 6.0 (Zolnierek), at 69-70; Staff Ex. 7.0 (Murray), at 7-9. Staff recommends that the Commission require direct trunking to a SBC tandem if traffic between MCI and this tandem exceeds a certain threshold level for a period of time. Id. This threshold traffic level should be set at DS-1 and the period of time should be set at consecutive three months. Staff IB at 21; Staff Ex. 7.0 (Murray), at 7-9. Staff's recommendation is that once traffic between MCI and a SBC tandem exceeds DS-1 during busy hours for three consecutive months, direct trunking to this SBC tandem is required. Id. This, avers Staff, is the position the Commission adopted in its *Verizon Arbitration Decision*. Staff IB at 21, citing *Arbitration Decision* at 6-8, In the Matter of Verizon Wireless: 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, ICC Docket No. 01-0007 (May 1, 2001).

SBC, however, objects to the Staff's recommendation. Staff recommends the Commission require direct trunking to an SBC tandem if traffic between MCI and this tandem exceeds DS-1 during busy hours for three consecutive months. Staff IB at 21. SBC argues that the "Staff mistakenly takes a standard that has been established for direct end office trunking and attempts to apply it to tandem trunking." SBC IB at 56. SBC has essentially identified a distinction without a difference. Staff RB, at 20.

In its *Verizon Arbitration Decision*, the Commission addressed the precise matter at issue here – tandem exhaust – stating that it was indeed a significant problem. *Arbitration Decision* at 7, In the Matter of Verizon Wireless: 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, ICC Docket No. 01-0007 (May 1, 2001) ("Verizon Arbitration Decision"). The Commission further rejected SBC's proposal that Verizon be required to trunk in all cases to every SBC end office, finding that Verizon ought not to have to duplicate SBC facilities to the end office. *Id.* The Commission therefore ruled – based upon Staff's recommendation – that, once traffic reached a certain level, Verizon would be required to trunk directly to the end office. *Id.* Thus, the rationale – alleviating tandem exhaust by taking traffic off the tandem – is the same. Staff RB, at 21.

SBC has cited a distinction without a real difference. Moreover, its solution – simply requiring direct trunking, regardless of traffic levels – is no different from the one rejected by the Commission in the *Verizon Arbitration Decision*. Staff RB, at 21. The Commission has found that direct trunking requirements – to end offices or tandems – should be based on traffic levels. The Staff's recommendation recognizes this, and should be adopted.

11. NIM Issue 16

Statement of Issue: When is mutual agreement necessary for establishing the requested method of interconnection?

The Staff recommends that the Commission reject MCI's proposed language as it relates to the Fiber Meet Point arrangement. Staff IB at 20; Staff Ex. 2.0 (Liu), at 65. Staff considers MCI's proposed language to go beyond the requirements imposed by Section 251(c)(2) of the federal Telecommunications Act. *Id.* First, asserts the Staff, MCI's proposed language does not limit MCI's rights to interconnect with SBC to technically feasible points within SBC's network. Staff IB at 20; Staff Ex. 2.0 (Liu), at 60. Rather, in Staff's view, MCI's proposal may allow MCI to interconnect with SBC at a (technically feasible) point that is not on SBC's network. *Id.* Second, Staff notes that MCI's proposed Fiber Meet Point interconnection arrangement not only requires that SBC provide

interconnection (as required under Section 251(c)(2)), but *it also requires SBC to provide interconnection facilities*, which clearly is beyond the scope of Section 251(c)(2). Staff IB at 20; Staff Ex. 2.0 at 60-61. Therefore, Staff opines that MCI's Fiber Meet Point interconnection agreement does not fall under Section 251(c)(2). *Id.* Accordingly, MCI's rights under Section 251(c)(2) do not, in Staff's view, apply to its proposed Fiber Meet Point (as described in NIM Appendix 4.4.4.3.1). *Id.* Consequently, Staff is of the opinion that MCI is not entitled to interconnect with SBC using the Fiber Meet Point interconnection arrangement. *Id.* The Staff, therefore, recommends that the Commission adopt SBC's language regarding Fiber Meet Interconnection. Staff IB at 20; Staff Ex. 2.0 at 65.

12. NIM Issue 17

Statement of Issue: MCI - Should facilities used for 251(c)(2) interconnection be priced at TELRIC rates?

SBC – Should a non-section 251/252 service Leased Facilities such be arbitrated in a section 251/252 proceeding?

The Staff recommends that the Commission decide this issue in favor of SBC, but with one caveat. Staff IB at 23. Staff contends that, contrary to SBC's contentions, the Commission's authority to arbitrate issues under Section 252 is not limited to disputes regarding UNEs under Section 251(c)(3). Staff IB at 23; SBC Ex. 2.0 at 29-35 (SBC's position). Rather, Staff contends that a state Commission's jurisdiction as arbitrator is not limited by Section 251(b) and (c); thus, where the parties have voluntarily included in negotiations issues *other than* those duties required of an ILEC by Section 251(b) and (c), those issues are subject to compulsory arbitration under Section 252(b)(1). Staff IB at 23, citing Coserv v. Southwestern Bell, 350 F.3d 482, 487; 2003 U.S. App. Lexis 23781 at 10 (5th Cir. 2003) (emphasis added). Accordingly, Staff is confident the Commission has the full authority to decide this matter. Staff IB at 23.

That said, the Staff recommends that the Commission reject MCI's language in NIM Appendix 4.3.1. Staff IB at 23; Staff Ex. 2.0 (Liu), at 76. Staff takes the view that MCI proposes language for NIM Appendix 4.3.1 (under NIM 17) would require that SBC provide *interconnection facilities* and do so at TELRIC-based rates. *Id.* In Staff's opinion, SBC is not required, under Section 251(c)(2), to provide MCI *interconnection facilities*. Staff IB at 23; Staff Ex. 2.0 at 74-75. Likewise, Staff does not believe SBC is obligated to provide interconnection facilities (as dedicated transport UNEs) at TELRIC-based rates under Section 251(c)(3) and 252(d), pursuant to the FCC's *Triennial Review Order*, ¶¶358-68, and the U.S. Circuit Court of Appeals for the District of Columbia Circuit's decision in U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 573 et seq.; 2004 U.S. App. Lexis 3960 at 45 et seq. (D.C. Cir. 2004) ("USTA II"). Staff IB at 23; Staff Ex. 2.0 (Liu), at 74-75. Therefore, the Staff recommends that the Commission reject MCI's proposed language. Staff IB at 23; Staff Ex. 2.0 at 76.

13. NIM Issue 18

Statement of Issue: MCI - Should SBC be permitted to limit methods of interconnection?

SBC a) Should MCI be required to interconnect on SBC's network?

b) Should the Fiber Meet Design option selected be mutually agreeable to both parties?

The questions presented in this issue are all related to the Fiber Meet Point Interconnection arrangement. Staff IB at 21; Staff Ex. 2.0 (Liu), at 66. The Staff's recommendations for NIM 18 are thus the same as those for NIM 16. Id.

14. NIM Issue 19

Statement of Issue: MCI - If MCI provides SBC Illinois with the jurisdictional factors required to rate traffic, should MCI be permitted to combine InterLATA traffic on the same trunk groups that carry Local and IntraLATA traffic?

SBC: What is the proper routing, treatment and compensation for interexchange traffic that terminates on a Party's circuit switch, including traffic routed or transported in whole or in part using Internet Protocol?

Staff recommends that the Commission adopt SBC's proposal requiring jurisdictional (i.e., separate) trunking. Staff IB at 17; Staff Ex. 2.0 (Liu) at 48. Such a decision, Staff argues, is consistent with the Commission's *Arbitration Decision, AT&T Communications of Illinois, Inc. / TCG Illinois and TCG Chicago: Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996*, ICC Docket No. 03-0239 (August 26, 2003), requiring IXC-carried traffic (IntraLATA or InterLATA) to be carried on a different set of trunk groups, not on the "Local Interconnection Trunk Groups" as defined in Staff recommendations under NIM 5 above. Staff IB at 17; Staff Ex. 2.0 (Liu) at 46; see also *AT&T Arbitration Decision* at 151-54. Further, Staff avers that there is no evidence that benefits of combined trunking, if any, outweigh the costs associated with the extra complexity in SBC's billing. Staff IB at 17; Staff Ex 2.0 at 43. Further, Staff considers there to be no evidence indicating the extent of the costs, conceded to exist, required to modify SBC's billing system to accommodate combined trunking. Staff IB at 17; Staff Ex. 2.0 at 44-45. Likewise, MCI does not indicate who will bear the costs of developing the necessary procedures (or modifications to SBC's existing billing systems). Staff IB at 17-18; Staff Ex. 2.0 at 45-46. Further, according to Staff, MCI simply does not propose any workable solutions for the "extra complexity"

caused by combined trunking. Id. MCI's promise to make a good-faith effort to work with SBC in developing procedures to deal with potential problems in billing issues is not equivalent to proposing a procedure that is likely to perform well in producing accurate measurements of jurisdictional traffic. Id. In short, there appears to be no reason for the Commission to depart from the *AT&T Arbitration Decision*. Staff IB at 18; Staff Ex. 2.0 at 48.

15. NIM Issue 22

Statement of Issue: MC - Does SBC's provision regarding the use of NXX codes have any application in a section establishing meet-point trunking arrangement?

SBC - Should each party be required to bear the cost of transporting FX traffic for their end user?

The Staff recommends that the Commission reject MCI's position and require parties to incorporate provisions regarding FX (Virtual NXX) services as arbitrated in this proceeding. Staff IB at 28; Staff Ex. 2.0 (Liu), at 93. Staff notes that the emergence of local competition (or interconnected networks) raises questions about jurisdictional distinction of traffic. Staff IB at 28-29. This proceeding, however, is not, in Staff's view, the appropriate platform to decide whether to abolish jurisdictional distinction of traffic. Staff IB at 29. In addition, the FCC is currently reviewing rules and regulations governing intercarrier compensation (FCC 01-0132). Id. Therefore, Staff recommends that the Commission require parties' agreement to reflect jurisdictional distinction of traffic, including but not limiting to, the Commission-approved local service area. Id.

Staff notes that FX traffic bears the characteristics of both toll and local traffic and other special characteristics. FX traffic bears the characteristics of toll traffic in that the calling and called parties are physically located in different local calling areas. Staff IB at 29; Staff Ex. 2.0 (Liu), at 90-91. FX traffic bears the characteristics of local calls in that the calling party pays the price of local call. Unlike standard calling-party-pay services, FX services are calling-and-called-party-pay services in that SBC collect charges from the calling party (local call charge) and from the called party for the toll service charge. Staff IB at 29; Staff Ex. 2.0 at 93. Therefore, Staff takes the view that FX traffic is a special type of service, which cannot be simply classified as local or toll services. Id. Staff notes that the Commission has, in several arbitrations, permitted carriers to establish interconnection regimes in which such calls are given special treatment. See, e.g., AT&T Arbitration Decision at 123; Order on Rehearing at 17, Global NAPs Illinois, Inc.: Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Verizon North, Inc., f/k/a GTE North Incorporated and Verizon South, Inc., F/k/a GTE South Incorporated, ICC Docket No. 02-0253 (November 7, 2002); Arbitration Decision at 6-10, Level 3 Communications, Inc.: 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, ICC Docket No. 00-0332 (August 30, 2000). In these arrangements, Staff observes, FX traffic is neither treated as local traffic, which is subject to reciprocal compensation, nor is treated as toll traffic, which is subject to access charge. Instead, FX traffic is subject to bill-and-keep intercarrier compensation regime, in which neither party is allowed to collect intercarrier compensation payment from the other. Staff IB at 29-30; Staff Ex. 2.0 (Liu), at 94. If the Commission is inclined to reconsider the past rulings, then the Staff recommends that this be done in a separate, industry-wide proceeding where all telecommunications carriers and interested parties can participate. Id. Until such time as this occurs, the Staff recommends that the Commission not depart from its consistent past rulings on this issue and require SBC and MCI to exchange FX (or virtual NXX) traffic on bill-and-keep basis – i.e., not subject to reciprocal compensation or long distance toll charge. Id.

Finally, the Staff notes that SBC's concerns regarding delivering toll traffic without appropriate compensation would be alleviated if the Commission adopt Staff's recommendation under NIM 15. Staff IB at 30; Staff Ex. 2.0 (Liu), at 94. Under Staff's proposal for NIM 15, MCI is required to establish direct trunk groups to end office or tandem office if traffic between that office and MCI's network exceeds the trigger level of DS-1 during busy hour for consecutive three months. Id. Thus, MCI would be required to provide trunk groups for transporting the virtual NXX traffic back to its virtual NXX (or FX) customer. Id.

16. NIM Issue 24

Statement of Issue: MCI - Should facilities used for 911 interconnection be priced at TELRIC rates?

SBC - Should a non 251/252 facility such as 911 interconnection trunk groups be negotiated separately?

Issue NIM 24 appears to the Staff to be quite similar to NIM 17, and subject to the same analysis. Staff IB at 27; Staff Ex. 2.0 (Liu), at 88. Staff sees SBC to contend that 911 interconnection facilities need not be offered at TELRIC-based rates, while MCI to argue that it is entitled to lease (or purchase) 911 interconnection facilities from SBC at TELRIC-based rates. Staff IB at 27; Staff Ex. 2.0 (Liu), at 89.

Staff observes that Section 251(c)(2) imposes on SBC the duty to provide interconnection to SBC's network. Staff IB at 28; Staff Ex. 2.0 (Liu), at 89. Section 251(c)(2), however, does not require SBC to provide interconnection facilities. Staff IB at 28; Staff Ex. 2.0 (Liu), at 89; 47 U.S.C §251(c)(3). As the FCC has made abundantly clear, Section 251(c)(2) interconnection, the physical linking of two networks, does not include the transport and termination facilities. Id. Moreover, as Staff noted in its analysis of Issue NIM 17, interconnection

facilities, facilities used by competing carriers to connect SBC's network to its own wire centers or switches, are entrance facilities. *Id.* The FCC, in its *Triennial Review Order*, excluded entrance (or interconnection) facilities from the definition of dedicated transport facilities. *Triennial Review Order*, ¶366, n. 1116. In other words, Staff argues, pursuant to the TRO, and USTA II, SBC is not required to offer interconnection facilities to MCI at TELRIC-based prices under Section 251(c)(3). Staff IB at 28; Staff Ex. 2.0 (Liu), at 89. Therefore, consistent with its position on NIM 17, Staff recommends that the Commission reject MCI's language and adopt SBC's – that is, SBC is not required to provide 911 interconnection at TELRIC-based prices to MCI. *Id.*

17. NIM Issue 28

Statement of Issue: For trunk blocking and/or utilization, what is the appropriate methodology for measuring trunk traffic?

Here, notes the Staff, the Commission is called upon to determine which proposed trunk blocking calculation methodology should be utilized. Staff IB at 30. MCI proposes that trunk requirements be based upon a calculation methodology using a *weekly peak busy hour average*, while SBC Illinois prefers a calculation methodology using *time consistent average busy season busy hour twenty (20) day averaged loads*. Staff IB at 30-31; Staff Ex. 5.0 at 4.

The Staff finds no evidence that SBC Illinois' proposed trunk forecasting methodology, which is the one in current use, is now or has been a problem for MCI, or for any CLEC. Staff IB at 31; Staff Ex. 5.0 at 7. Staff notes that SBC witness Carl Albright reported the average trunk utilization for MCI, and the numbers were not troubling to Staff, revealing a significant number of underutilized trunk groups. Staff IB at 30; Staff Ex. 5.0 at 7, citing SBC Ill. Ex. 2.0 (Albright), at 37 (precise utilization figures are proprietary). Based upon these figures, the Staff is inclined to discount the idea that there is any significant danger of trunk group blockage between these two carriers, regardless of what forecasting method is used. Staff IB at 30; Staff Ex. 5.0 at 7.

Additionally, Staff notes that investigation of trunk blockage that SBC Illinois reported on the CLEC Online performance measurement site revealed no problems. Staff IB at 30; Staff Ex. 5.0 at 8. For PM 70, Percentage of Trunk Blockage (Call Blockage), SBC Illinois reported no months from January 2004 to June 2004 in which its trunk performance to MCI failed, or nearly failed, the parity measure.⁶ *Id.* In the aggregate – to all CLECs – SBC Illinois reported no failure, or near failure, relative to the trunk blockage parity measure of PM 70. *Id.*

The Staff recommends that SBC Illinois not be directed to modify its trunk forecasting methodology. Unless there is a demonstrated pattern of trunk blockage from SBC Illinois to the CLEC community due to forecasting errors,

⁶ The only months reported for PM 70 were from January 2004 through June 2004.

there appears in the Staff's view to be no need to make the change MCI requests. Staff IB at 30; Staff Ex. 5.0 at 8-9.

18. NIM Issue 30

Statement of Issue: Should SBC ILLINOIS be required to provision trunk augmentments within 30 days?

Staff engineering witness Russell W. Murray, testified that there are situations where SBC may need more than thirty (30) days to provision trunk augmentation, and in those situations MCI's proposed 30-day provisioning requirement ("in any event shall not be longer than thirty (30) days") is unreasonable. Staff Ex. 7.0 (Murray), at 4-5. SBC witness Carl Albright testified that SBC "usually works under a 20-business day *guidelines*, not an absolute requirement." SBC Ex. 2.0, at 19. The Staff finds SBC's proposed language to be more reasonable than an absolute requirement that fails to address extreme conditions that may be out of SBC's control. Staff IB, at 32 *citing* Staff Ex. 7.0 at 4-5. The Staff, accordingly, recommends that SBC's proposed language be adopted. Id. The Staff also notes that its recommendation is consistent with other provisions of Section 19.4 that allows either party to "notify the other party of any change affecting the service request, including, but not limited to the due date." Id.

19. NIM Issue 31

Statement of Issue: MCI For transit traffic exchanged over the local interconnection trunks, what rates, terms and conditions should apply?

SBC Should a non-section 251/252 services such as transit service be arbitrated in this section 251/252 proceeding?

The Staff notes that there are no clear or explicit guidelines in the Telecommunication Act or FCC rules or the Illinois Public Utilities Act governing the provisioning of transit services. Staff IB at 24; Staff Ex 2.0 at 79-80. However, the Staff is of the opinion that the Commission certainly can, and recommends that it should, address issues related to transit services from public policy perspectives. Staff IB at 24; Staff Ex. 2.0 at 84-85. Staff observes that transit services are essential, for the provision of telecommunications services, to some carriers – in particular, smaller carriers, which lack the resources to interconnect with every other carrier for the mutual exchange of telecommunications traffic. Staff IB at 24; Staff Ex. 2.0 at 85. Therefore, Staff considers sound public policy to require that SBC provide transit services. Id. Staff accordingly recommends that the Commission require SBC to provide transit services to MCI and any requesting carriers (not as an optional service). Id.

For practical reasons, the Staff also recommends that the Commission require SBC to provide transit services as a part of the parties' interconnection agreement. Staff IB at 24; Staff Ex. 2.0 at 85. Staff notes that transit services have been traditionally included in interconnection agreements in Illinois. Id. Staff thus recommends that the Commission arbitrate transit service issues in this proceeding and require parties to incorporate the rates, terms and conditions (as arbitrated) in parties' interconnection agreement. Id. In any case, Staff considers this matter to be properly within the scope of arbitration pursuant to the Fifth Circuit's Coserv decision, explained in greater detail in Staff's analysis of Issue NIM 17, *supra*.

Staff sees MCI to have adopted a "pick-and-choose" approach in selecting rates for transit services. Staff IB at 25; Staff Ex. 2.0 (Liu), at 85. Staff therefore considers MCI's proposed rates, as a result, to be inappropriate. Id. Accordingly, Staff recommends that the Commission reject MCI's proposed rates for transit traffic as listed in Appendix Pricing. Id.

Staff notes that, under SBC's proposal, the Commission-approved transit rates apply when the volume of traffic is no greater than thirty million MOUs (Minutes of Usage) in a month (1.1), and a different set of rates shall apply in a month if traffic volume reaches above thirty million MOUs (1.2). Staff IB at 25; Staff Ex. 2.0 (Liu), at 85-86. SBC does not explain or provide support for its rates proposed for larger volume of traffic. Staff IB at 25; Staff Ex. 2.0 at 86. Staff therefore, recommends the Commission require SBC to apply the Commission-approved transit rates all transit traffic regardless whether traffic volume is greater than 30 million or not in a single month. Id.

Finally, Staff recommends that the Commission adopt SBC's proposed language for transit services on Appendix Transit Traffic Service with a few modifications, as set forth below. Staff IB at 25; Staff Ex. 2.0 at 86. SBC also proposed to include terms and conditions for transit services in a separate appendix – Appendix Transit Traffic Service. Id. Staff does not consider SBC's proposal unreasonable. Id. In addition, MCI has offered no useful information that would enable Staff to evaluate MCI's "added protection" language, see MCI Ex. 11.0 at 22, which has the appearance of being unreasonable. Staff IB at 25; Staff Ex. 2.0 at 84, 86. For example, MCI witness Dennis L. Ricca suggests the added "protection" ensures that SBC cannot continue to dispute and not pay for reciprocal compensation." MCI Ex. 11.0 at 22. However, SBC as a transit provider does not have any *obligation* to pay for reciprocal compensation. Staff IB at 25; Staff Ex. 2.0 at 86. This is because reciprocal compensation is owed by the carrier on whose network traffic originates, to the carrier on whose network the traffic terminates, since FCC rules specifically provide that: "a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier." Staff IB at 26; 47 C.F.R.

§51.701(e). According to Staff, transiting – which involves traffic that originates on one carrier’s network, terminates on a second carrier’s network, and transits a third network between the first two – is not contemplated in reciprocal compensation arrangements. Staff IB at 26. MCI’s attempt to collect reciprocal compensation for transited traffic – if, indeed, MCI is making such an attempt – is improper. Id.

Staff therefore recommends that the Commission require that parties incorporate terms and conditions and rates as arbitrated in this proceeding into Appendix Transit Traffic Service. Staff IB at 26. Staff recommends the following changes to SBC’s proposed language for transit services:

- (1) Consistent with the recommendation above, Staff recommends the deletion of language indicating that transit services offered by SBC is an optional services:

Transit Traffic Service Appendix:

1.3: Transit Traffic Service is ~~an optional non 251/252 service~~ provided by SBC Illinois to MCI where MCI is directly interconnected with an SBC tandem.

~~3.1: The Parties agree that SBC ILLINOIS is not obligated under Sections 251 and 252 to the Act to provide MCI with SBC ILLINOIS’ Transit Traffic Services as a means for MCI to indirectly interconnect with Third Party Terminating Carriers. MCI has the option of using the Transiting Traffic Service provided by SBC or any other telecommunications carriers that provides similar services.~~

- (2) Consistent with this recommendation, Staff further recommends the deletion of language containing the threshold traffic volume and the rates for high volume traffic:

1.1: ~~When CLEC’s Transit Traffic is 30,000,000 minutes of usage or less in a single month, the rate~~ The rates for all transit traffic originated by the CLEC for that month will be:

Tandem Switching -	\$0.004836 per MOU,
Tandem Transport -	\$0.000189 per MOU,
Tandem Transport Facility -	\$0.0000093.

1.2: When CLEC’s Transit Traffic is greater than 30,000,000 minutes of usage in a single month, the rate for all transit traffic originated by the CLEC for that month will be:

Tandem Switching	\$0.006045 per MOU,
Tandem Transport	\$0.000236 per MOU,

Staff IB at 26-7; Staff Ex. 2.0 at 86-7

20. NGDLC Issue 1

Statement of Issue: SBC - Should MCI's proposed terms for a broadband end-to-end UNE that are in direct contravention of the FCC's TRO and implementing rules be rejected?

MCI: Should MCI'S proposed terms for NGDLC that are in absolute conformance with effective and binding Commission orders on the subject be included in the agreement?

MCI's position, which is that the Commission's *Line Sharing Order on Second Rehearing* remains in effect, see MCI IB at 91, is correct as far as it goes. However, the Commission has reopened the matter, reheard it, and an Administrative Law Judge's Proposed Order has been issued, which substantially alters the Order. In accordance with these facts (and taking into account the filings of the respective parties), the Staff's final revised recommendation concerning Issue NGDLC1 is as follows:

The Commission should reject MCI's proposed language for NGDLC1. In its place, the Commission should require the parties to produce language clarifying that, notwithstanding the language adopted for Issue UNE 31, MCI may purchase the "Project Pronto Broadband UNE offering (i.e. the offering at issue in NGDLC1) through valid Commission tariff, to the extent such tariff exists.

21. LNP Issue 3 / Price Schedule Issues 10/25

Statement of Issues: Which Party's terms and conditions for *coordinated cutovers* should be included in the Agreement? (LNP3)

What are the appropriate labor rates? (PRICE SCHEDULE 10)

What are the appropriate rates for Coordinated Hot Cuts? (PRICE SCHEDULE 25)

The Staff recommends that the Commission adopt SBC's language, with certain modification. Staff IB, at 34-35, *citing* Staff Ex. 2.0 (Liu), at 10-11. It is not unreasonable for SBC to incorporate language in the CHC Appendix that allows it to suspend a mutually agreed upon scheduling of a CHC cutover. Id. However,

the CHC Appendix should also incorporate language to afford MCI the same protection in the CHC Appendix. *Id.*; Staff IB, at 34-35.

Regarding CHC rates, the Commission has addressed issues related to CHC cutovers in the *AT&T Arbitration Decision*, finding that SBC should be compensated for the extra work involved in performing CHC cutovers, under the labor rates set forth in SBC's FCC Access Tariff No. 2. *AT&T Arbitration Decision* at 107. There is no reason to depart from this finding. Staff IB, at 34-35; Staff Ex. 2.0 (Liu), at 11.

22. Price Schedule Issue 3

Statement of Issue: Prior to the conformance of the ICA being negotiated, should the disaggregated NRCs SBC included in the Price List be shown as currently effective rates if SBC is precluded from delaying their effective date?

The Staff recommends that the rates based on the Commission's UNE Loop Order, which will be contained in a forthcoming SBC tariff, should be used in this ICA. Staff IB, at 35. The rates in the ICA can then be modified, if needed, once the applicable SBC tariffs are modified. Staff IB, at 35, *citing* Staff Ex. 4.0 (Hanson), at 4. Finally, the Staff recommends that the disputed footnote 7 should more closely track the Commission's Order in its UNE Loop Order. The Staff, accordingly, recommends that footnote 7 read as follows: "In accordance with the Commission's UNE Loop Order in Docket No. 02-0864, the connect and disconnect charges must be disaggregated within the first quarter of 2005." Staff Ex. 4.0 at 4.

23. Price Schedule Issue 4

Statement of Issue: Prior to the conformance of the ICA being negotiated, should the Illinois Price List be updated to exclude combined rates that the ICC ordered SBC to disaggregate if SBC is prohibited from charging combined rates?

This issue is similar to Price Schedule Issue 3 immediately above. The Staff, like above, recommends that the rates based on the Commission's UNE Loop Order in Docket No. 02-0864, which will be contained in a forthcoming SBC tariff, should be used in this ICA. Staff IB, at 35-36. The rates in the ICA can then be modified, if needed, once the applicable SBC tariffs are modified. Staff Ex. 4.0 (Hanson), at 5. Finally, the Staff recommends that the disputed footnote 7 should more closely track the Commission's UNE Loop Order in Docket No. 02-0864, and read as follows: "In accordance with the Commission's UNE Loop Order in Docket No. 02-0864, the connect and disconnect charges must be disaggregated within the first quarter of 2005." Staff Ex. 4.0 at 5.

24. Price Schedule Issue 11

Statement of Issue: What are the appropriate rates for central office to engineering control splice, central office to remote terminal, central office to serving area interface, and central office to terminal subloops?

The Staff disagrees with MCI witness Don Price's statement that "SBC's obligation under federal law is the same as it was on June 15, 2004." Staff IB, at 36-37, *citing* MCI Ex. 12.0 (Price Supplemental Revised), at 28. The Staff also disagrees with SBC witness Michael Silver's statement that "[T]o the extent any network elements have been declassified, they should not be included in this Pricing Schedule." SBC Illinois Ex. 14.0 (Silver), at 40.

The Staff, however, agrees with SBC witness Mr. Silver that SBC is no longer obligated to provision feeder subloops as a UNE. As Mr. Hoagg noted in his testimony, however, even though these are no longer UNEs, they are subject to unbundling requirements under Section 271 of the Federal Act and Section 13-801 of the Public Utilities Act. Staff Ex. 1.0 (Hoagg), at 23. If the Commission were to order the use of the interim rates as MCI proposes, SBC would be in compliance with its requirements under Section 271 and 13-801 of the Public Utilities Act ("PUA"). SBC, however, would also be in compliance with its unbundling requirements under Section 271 of the Federal Act and Section 13-801 of the PUA, if it provided feeder subloops at rates based on a cost-based methodology other than TELRIC. SBC failed, however, to provide the Commission with proposed rates, instead arguing that no rates should be included for declassified UNEs. As noted above, SBC has an obligation to provide certain network elements under Section 271 of the Federal Act and under Section 13-801 of the PUA. Staff Ex. 4.0 (Hanson), at 6. Consequently, since MCI is the only party that has proposed rates for these network elements, the Staff recommends that the Commission adopt MCI's proposed interim rates. Staff IB, at 37.

25. Recip Comp Issue 1

Statement of Issue: MCI - Should reciprocal compensation be determined by the physical location of the end user customers?

SBC a) What are the appropriate classification of traffic that should be addressed in the Reciprocal Compensation Appendix?

b) What are the appropriate definition and scope of §251(b)(5) traffic and ISP-bound traffic in accordance with the FCC's ISP Terminating Compensation Plan?

c) Is §251(b)(5) reciprocal compensation limited to traffic that originates and terminates within the same ILEC local calling area?

d) Is it appropriate to define local traffic and ISP-bound traffic in accordance with ISP Compensation Order?

Staff recommends that the Commission reject MCI's position and instead adopt SBC's position. Staff IB, at 37-38, *citing* Staff Ex. 2.0 (Liu), at 98. In its Local Competition Order, the FCC *initially* defined traffic subject to 251(b)(5) as "local traffic" that originates and terminates in the same local calling area. ISP Remand Order, ¶12; First Report and Order, ¶¶1034-1035, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC No. 96-365 CC Docket Nos. 96-98; 95-185, 11 FCC Rcd 15499; 1996 FCC Lexis 4312; 4 Comm. Reg. (P & F) 1 (August 8, 1996) (hereafter "Local Competition Order"). In its *ISP Remand Order*, however, the FCC found the term "local traffic" creates ambiguities and adopted new characterization of traffic that is subject to 251(b)(5). ISP Remand Order, ¶52. Specifically, the FCC excluded ISP-bound traffic from Section 251(b)(5) and dropped the term "local traffic." Id.; see also 47 C.F.R. §51.701. MCI's definition of "local traffic" contradicts the FCC's rules. Staff Ex. 2.0 (Liu), at 98. Therefore, Staff recommends that the Commission reject MCI's position and require parties to categorize traffic in accordance with FCC ISP Order. Id.

26. Recip Comp Issue 4

Statement of Issue: MCI - Should reciprocal compensation arrangement apply to calls terminated to customers not physically located in the same Illinois local calling area, i.e., Foreign Exchange (FX) calls?

- SBC
- a) What is the appropriate form of intercarrier compensation for FX and FX-like (virtual NXX) traffic?
 - b) If FX and FX-like traffic must be segregated and separately tracked for compensation purposes, how should that be done?

Staff sees no reason why the Commission should find differently in this proceeding than it did in the *AT&T Arbitration Decision*. Staff therefore recommends that the Commission, consistent with its past rulings, determine that both ISP-bound and non-ISP-bound FX (or FX-like) traffic are properly subject to a bill-and-keep regime. Staff IB, at 38-39, *citing* Staff Ex. 2.0 (Liu), at 101; AT&T Arbitration Decision at 129-130. In addition, Staff recommends that the Commission not depart from its decision on the tracking method – thus requiring parties to adopt the same tracking method as adopted by the Commission in *AT&T Arbitration Decision*. Id. More specifically, Staff recommends that the Commission order parties to replace all of SBC's proposed language for section

15 (Reciprocal Compensation Appendix): *Segregation and Tracking FX Traffic* with the following:

15 SEGREGATION AND TRACKING FX TRAFFIC

15.1 In order to ensure that FX traffic is being appropriately segregated from other types of intercarrier traffic, the parties will assign a Percentage of FX Usage (PFX), which shall represent the estimated percentage of minutes of use that is attributable to all FX traffic in a given month.

15.1.1 The PFX, and any adjustments thereto, must be agreed upon in writing prior to the usage month (or other applicable billing period) in which the PFX is to apply, and may only be adjusted once each quarter. The parties may agree to use traffic studies, retail sales of FX lines, or any agreed method of estimating the FX traffic to be assigned the PFX.

This is what the Commission ordered in the *AT&T Arbitration Decision*. AT&T Arbitration Decision at 130.

27. Recip Comp Issue 5

Statement of Issue: MCI - Given that SBC's proposal fro Recip Comp 2.12 does not carefully define categories of traffic that parties will exchange with each other and how such traffic should be compensated, should SBC's additional terms and conditions for internet traffic set forth in section 2.12 et seq. be included in the Agreement?

- SBC
- a) What is the appropriate treatment and compensation of ISP traffic exchanged between the parties outside of the local calling area?
 - b) What is the appropriate routing and treatment of ISP calls on an inter-exchange basis, either IntraLATA or InterLATA?
 - c) What types of traffic should be excluded from the definition and scope of section 251(b)(5) traffic?

The Staff notes that the FCC interim intercarrier compensation plan (as provided in its *ISP Order*) applies to ISP-bound traffic, traffic originating from callers to an ISP provider physically located in the same local calling area. Staff IB, at 39, *citing* Staff Ex. 2.0 (Liu), at 105. The intercarrier compensation plan,

however, does not apply to Exchange Access, Information Access, or Exchange Access for such access (excluding ISP-bound traffic). Id. For example, it does not apply to ISP traffic that originates and terminates in different local calling areas. Id. Staff therefore recommends that the Commission require parties clarify that the FCC's interim intercarrier compensation plan is only applicable to *ISP-bound traffic*, which includes only calls from end users to ISP providers physically located in the same local calling area. Id.

28. RESALE Issue 1

Statement of Issue: May MCI resell, to another Telecommunication Carrier, services purchased from Appendix Resale?

The Staff recommends that the Commission adopt SBC's proposed language regarding reselling to carrier end users with the following proposed restrictions. Staff IB, at 40-41 *citing* Staff Ex. 2.0 (Liu), at 25. A carrier, when purchasing services for its own use as end user of the service, is simply an end user of the services, and is not situated differently than non-carrier end users. Id. The non-discrimination provision in Section 251 requires that MCI resell to carrier end users at the same rates, terms and conditions as it resells to non-carrier end users. Id. Therefore, the parties should include this restriction in their ICA. Id.

Staff recommends that the Commission permit MCI, *under certain restrictions*, to resell SBC wholesale services to other resellers. Staff Ex. 2.0 (Liu), at 26. Unrestricted resale by MCI to third carriers for the provision of telecommunications services might have undesirable effects, such as creating circumstances in which MCI obtains wholesale *residential* services from SBC that is ultimately resold or provided to a business customer, thus circumventing the residential/business cross-class reselling prohibition. Staff Ex. 2.0 (Liu), at 17-19, 23, 26-7. Therefore, some restrictions are necessary to address the potential adverse effects (including those raised by SBC) arising from reseller chains. Id. at 26-7. Staff recommends that the Commission impose the following restrictions on the reselling SBC's wholesale-discounted services to a third carrier for the provision of telecommunication services:

- (1) Any carrier, who purchases SBC's wholesale-discounted services through MCI, will be subject to the terms and conditions as MCI under MCI/SBC Agreement, including, but not limiting to, not using SBC logo or name brand;
- (2) MCI will be held responsible for any breach or violation of the terms and conditions (as provided in MCI/SBC Agreement) by such a third carrier, and
- (3) MCI shall not circumvent the prohibition in Section 4.10 of the Resale Appendix by purchasing back (directly or indirectly), for its

own use, SBC's wholesale-discounted services, from a carrier, who obtained the services (directly or indirectly) from MCI.

Staff IB, at 41; Staff Ex. 2.0 (Liu), at 26-7.

29. RESALE Issue 4

Statement of Issue: Should MCI be permitted to aggregate traffic for multiple end user customers onto a single service?

Staff recommends that the Commission adopt SBC's proposed language. Staff IB, at 41-42, *citing* Staff Ex. 2.0 (Liu), at 34. Section 251(c)(4) clearly requires that SBC offer for resale a service that it offers at retail to its end user customers. Staff Ex. 2.0 (Liu), at 32-34; 47 U.S.C. §251(c)(4). It does not require that SBC offer for resale a service that SBC does not offer at retail for its own customers, nor does it require that SBC tailor its retail service offering to fit the business plans of resellers. Id. MCI's proposed language clearly goes beyond the requirement of Section 251(c)(4). Id. While the FCC, in its *Local Competition Order*, establishes a presumption that restrictions in resale are unreasonable, see *Local Competition Order*, ¶1939, the FCC does not preclude a state commission from finding that such restriction is, nonetheless, reasonable and nondiscriminatory. Id.

30. RESALE Issue 8

Statement of Issue: Which Party's proposal for the resell of Customer Specific Arrangement (CSA) should apply?

Staff recommends that the Commission adopt SBC's proposed language. SBC's language is more specific and provides appropriate details. Staff IB, at 42, *citing* Staff Ex. 2.0 (Liu), at 35-37. MCI's only criticism of SBC language is that it contains unnecessary or ambiguous language, MCI does not indicate which part of SBC language that it deems unnecessary or ambiguous. Id.

31. UNE Issue 2

Statement of Issue: SBC - Should the UNE Appendix contain details concerning the transitional plan for declassified elements?

MCI - Should SBC's proposed UNE declassification procedures be included in the agreement?

This issue is essentially a dispute over the operation of the "change of law" process and "declassified" network elements. Staff IB, at 45-46, *citing* Staff Ex. 1.0 (Hoagg) at 16. In Staff's opinion, SBC has not presented a persuasive case that, as a general matter, the change of law process should be superseded. Id. Staff understands that the change of law process has been widely accepted

and widely utilized in interconnection agreements. Triennial Review Order, ¶¶700-706. There no compelling reason this cannot continue to be the case generally with respect to UNE issues. Staff Ex. 1.0 (Hoagg) at 16. It appears that the FCC presumes these provisions can function well enough in an environment of element declassifications, as indicated by the following:

In order to allow a speedy transition in the event we ultimately decline to unbundled switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, the results of such proceedings must reflect the transitional structure set forth below. Interim Requirements Order, ¶22.

Moreover, in a recent arbitration decision, the Commission has rejected a similar proposal by SBC. Arbitration Decision at 46-50, XO Illinois, Inc.: Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, ICC Docket No. 04-0371 (September 9, 2004).

MCI's proposed Section 1.1.1 would clarify slightly the operation of the agreement's change of law provision with respect to UNEs and, as such, appears generally unobjectionable. Staff Ex. 1.0 (Hoagg) at 17. The Commission may have two concerns with this language, however. *Id.* First, it is not clear it serves any meaningful purpose if SBC's proposed language is rejected. *Id.* Second, and more significantly, the Commission should find that the current circumstances surrounding the potential imminent Section 251 declassification of the switching, enterprise market loops and dedicated transport elements to be unique. *Id.* In the Staff's view, these warrant a specific and limited departure from the usual application of change of law provisions as they apply to UNEs and potential Section 251 declassifications. *Id.* Given certain findings of the TRO, the USTA II decision and the FCC's Interim Order, the Commission can have a reasonable degree of confidence that at least some further declassifications will occur with respect to switching, loop and dedicated transport elements. *Id.* As noted above, key mandates of the FCC Interim Order reflect this likelihood:

[W]e do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, the results of such proceedings must reflect

the transitional structure set forth below. Interim Requirements Order, ¶22.

Staff recommends that the Commission direct the parties to produce language creating two explicit and limited exceptions to the usual operation of change of law provisions.⁷ Staff Ex. 1.0 (Hoagg) at 18. The first of these exceptions should be for elements that currently are declassified. *Id.* The second specifically should be for “declassifications” that may occur directly as a result of the FCC’s August 20, 2004 NPRM (released in conjunction with the Interim Requirements Order). *Id.* The provisions produced by the parties generally should reflect the following:

- Since SBC will continue to provide Section 251 declassified elements on an unbundled basis pursuant to Section 271 of the 1996 Act and/or PUA Section 13-801, declassification results in repricing of the elements or element combinations involved. TELRIC pricing no longer is required for such elements or element combinations.
- Repricing may occur after a 30-day period, subject to appropriate notification by SBC. *Id.*

These provisions should be self-effectuating and would require no further amendment to the agreement to operate. *Id.* These provisions should be limited directly and explicitly to the elements in question. *Id.* The agreement change of law provisions will apply to all other future potential declassifications. *Id.*

32. UNE Issue 5

Statement of Issue: Should MCI be permitted to use SBC Illinois’ Unbundled Network Elements (“UNEs”) to provide service to other Telecommunication Carriers?

SBC takes the position that MCI may not use SBC UNEs to provide service to other telecommunications carriers for resale. 8/10/04 DPL, Issue UNE 5. SBC bases its position on its view that the law only permits MCI to obtain access to UNEs for the purposes of providing telecommunications services and that MCI services must be provided directly to the public by MCI in order to qualify as telecommunications services. See SBC Ex. 7.0 at 5-7. SBC also argues that the TRO supports this reading. *Id.*

⁷ In addition, if the Commission adopts MCI’s proposed Section 1.1.1, it should be revised by the parties to accommodate Staff’s recommended exception.

The Commission should reject SBC's position. "Telecommunications Services" should not be interpreted so narrowly. The definition of telecommunications services contained in the 1996 Act includes offerings of services to such classes of users as to be effectively available directly to the public. *Id.* If MCI provides services to a telecommunications carrier for the purposes of resale to the public then MCI is offering services to a class of users as to be effectively available directly to the public.

In addition FCC explicitly declared in the TRO that "[t]he Commission has interpreted 'telecommunications services' to mean services offered on a common carrier basis..." and "[c]ommon carrier services may be offered on a retail or wholesale basis...[.]" TRO at ¶¶150, 152. While the D.C. Circuit remanded those sections of the TRO that include the FCC's pronouncements on the definition of telecommunications services, it did so because the FCC interpreted the term "telecommunications services" in an overly narrow manner. ("The argument that long distance services are not 'telecommunications services' has no support." USTA II, 359 F.3d at 592; 2004 U.S. App. Lexis© 3960 at 101.) Therefore, if the TRO and USTA II offer any guidance, it is in support of the notion that telecommunications services include wholesale services.

MCI opposes SBC's proposal to prevent MCI from using UNEs to provide service to other telecommunications carriers for resale. 8/10/04 DPL, Issue UNE 5. MCI bases its position on its view that that such a restriction would run afoul of the state and federal regulations and that this Commission decided this issue in its AT&T Arbitration Decision. MCI Ex. 8.0 at 46-47.

The Commission should reject MCI's position. In its Section 13-801 Implementation Order, the Commission determined that CLECs may resell intraLATA toll to other interexchange carriers ("IXCs").⁸ However, the Commission also determined in its Section 13-801 Implementation Order that "CLECs purchasing EELs may not resell them, but must use them to provide service the CLEC end users or payphone providers, no matter how the EEL is purchased."⁹ Therefore, as a matter of current state law, the Commission has permitted the imposition of resale restrictions on CLECs requesting use of UNEs.

Furthermore, at issue in the AT&T arbitration proceeding was "May AT&T use UNEs to provide service to itself and its affiliates?" In that proceeding the Commission identified one specific scenario of concern stating: "SBC argues that AT&T would have the ability to resell the intra-LATA toll portion of the network element platform to an interexchange carrier ('IXC') for the use by the IXC to provide service to an end user." The Commission then went on to identify the

⁸ MCI Ex. 8.0 at 47.

⁹ Section 13-801 Implementation Order at 176. An extended enhanced link ("EEL") is generally defined as a combination of a unbundled loop or loops and unbundled dedicated transport.

basis for its decision as Section 13-801 of the PUA. In its Section 13-801 Implementation Order, the Commission determined that CLECs may resell intraLATA toll to other interexchange carriers (“IXCs”). Therefore, the AT&T Arbitration Decision, which did permit AT&T to use UNES to provide services to other telecommunications providers in certain instances, was consistent with the Commission’s implementation of Section 13-801 of the PUA. It is not, therefore, clear that the AT&T Arbitration Decision clearly favors MCI’s position on this issue as MCI suggests.

MCI argues that the Commission’s AT&T Arbitration Decision is “not unclear” on this issue. MCI Ex. 14.0 at 11. MCI employs a double negative (“not unclear”) presumably with the intention of implying that the AT&T Arbitration Decision is “clear” on this issue. However, the Commission’s AT&T Arbitration Decision is not clear and is not definitive with respect to Issue UNE 5 in this proceeding.

Staff reiterates that the issue here, as presented in MCI’s Petition, is “Should MCI be permitted to use SBC Illinois’ Unbundled Network Elements (“UNEs”) to provide service to other Telecommunications Carriers?” In the AT&T Arbitration Decision the Commission was asked to determine whether AT&T could use UNEs to provide service to itself and its affiliates. AT&T Arbitration Decision at 47. The Commission’s AT&T Arbitration Decision did not speak to the issue of whether or not AT&T could provide service to non-affiliated third party telecommunications providers --- the group of providers to whom MCI presumably seeks to offer service with UNEs through its proposal here. Thus, the AT&T Arbitration Decision cannot be definitive because the disputes are not the same.

Similarly, MCI’s proposed language differs significantly from that proposed by AT&T. In the AT&T Arbitration, AT&T proposed (and the Commission accepted) the following language:

9.2.4 AT&T may use one or more UNEs or Combinations to provide to itself, its affiliates and to AT&T End Users any feature, function, capability or service option that such UNE provided on an unbundled basis or Combination is technically capable of providing or any feature, function, capability or service option that is described in the applicable Telcordia and other industry standard technical references.

9.3.2.5 At the request of AT&T, SBC shall also provide Unbundled Network Elements to AT&T in a manner that allows AT&T to combine those Unbundled Network Elements to provide a telecommunications service. SBC shall permit AT&T to combine any Unbundled Network Element(s) obtained from SBC with

Compatible Network Components provided by AT&T or provided by third parties to AT&T or combined any Unbundled Network Element(s) with other services (including access services) obtained from SBC Illinois in order to provide telecommunication services to AT&T, its end users and its affiliates as long as these combinations are consistent with FCC's Supplemental Order Clarification in CC Docket No. 96-98, FCC 00-0183.

AT&T Arbitration Decision at 48. Here, MCI proposes:

2.3 MCI may use SBC ILLINOIS's Lawful unbundled Network Elements to provide services to other Telecommunications Carriers.

Thus, MCI's implication that the AT&T Arbitration Decision definitively resolves this issue is baseless. MCI has not asked the Commission in Issue UNE 5 to grant it the ability to use UNEs to provide service to itself and its affiliates, but rather to grant it the ability to use UNEs to provide service to other Telecommunications Carriers.

Furthermore, in its criticism of the Staff position, MCI appears to reject reliance on the Commission's 13-801 Implementation Order in determining this issue. This is an untenable position, because, as Staff has pointed out and MCI seems to acknowledge, the Commission's AT&T Arbitration Decision was grounded in State law requirements; requirements set forth in its Section 13-801 Implementation Order. Thus, MCI is presumably asking the Commission to make its arbitration decisions by selectively adhering to and rejecting its own determinations regarding state law requirements. That is, MCI would have the Commission decide this issue by relying on the state law determinations that it relied on in the AT&T Arbitration Decision, while ignoring state law determinations, in particular those regarding the resale of EELs, that go directly to the issue in dispute in this proceeding.

MCI also argues that the Commission should disregard its Section 13-801 Implementation Order because the Commission's decision with respect to the resale of EELs was "based on the inadequacy of the record." MCI Ex. 14.0 at 11. MCI does not, however, provide any information that would permit the Commission to determine that it was wrong in its prior determination. Thus, until the Commission is presented with adequate information, there is no reason to depart from its determination in the Section 13-801 Implementation Order.

MCI describes Dr. Zolnierек's recommendation to follow the Section 13-801 Implementation Order as "especially inappropriate" because Dr. Zolnierек testified before the Commission in Docket No. 01-0614 that he was unaware of any restriction that would prevent a CLEC from reselling an EEL. MCI Ex. 14.0 at 12. However, it is unclear why MCI deems Dr. Zolnierек's recommendation "especially inappropriate." The Commission issued its 13-801 Implementation

Order in Docket No. 01-0614 with full knowledge of Dr. Zolnierek's testimony in that proceeding. With this knowledge the Commission imposed a restriction on the resale of EELs. Thus, there is now a restriction imposed by the Commission that would prevent a CLEC from reselling an EEL. Clearly, based on his recommendation, Dr. Zolnierek is aware of this Commission imposed restriction. Thus, Dr. Zolnierek's recommendation, which relies on the Commission's Section 13-801 Implementation Order, is appropriate.

MCI also criticizes Staff's proposal, as it relates to implementation of state law, as overly broad arguing that the Commission must clearly delineate the parties' obligations in arbitrating issues. MCI Ex. 14.0 at 13-14. MCI overlooks the fact that Staff made specific proposals that delineate the parties obligations with respect to two specific situations that Staff, based on scenario's addressed in Docket No. 01-0614, considered might arise: (1) instances in which MCI wishes to resell intraLATA toll to IXCs using SBC UNEs; and (2) instances in which MCI wishes to resell EELs to parties other than its own end users or payphone providers. ICC Staff Ex. 6.0 at 14. Staff very specifically articulated that neither party provided any specific scenarios under which MCI might seek to provide resold service using SBC UNEs and that Staff did not make and conjectures in this regard. ICC Staff Ex. 6.0 at 14. The responsibility for any failure of Staff to supply recommendations that "clearly delineate the parties' obligations" finds its source in the parties' failure to supply clearly delineated disputes with respect to this issue.

In its response to Staff, MCI elected to supplement the record with one additional scenario, presumably, for which it seeks guidance. This scenario refers to an "agent" relationship between MCI and Carrier X in which a presumably unaffiliated carrier would provide MCI branded service using some combination of its own equipment and an MCI leased UNE loop. It is unclear whether SBC would oppose MCI's proposed use of a UNE loop in this manner (or whether MCI has provided enough information for SBC to make such a determination) or why MCI did not raise these and other specific issues in either negotiations leading up to this arbitration or its petition to the Commission. However, in the event that the parties do have a dispute regarding this issue, MCI has provided absolutely no analysis of whether state law requires SBC to provide a loop to MCI for such purposes or why. It is precisely this type of vaguely defined request that Staff recommends the companies address first through negotiation and then, if necessary, through dispute resolution. Staff does not recommend that the Commission make such determinations, as appears to be the case here, absent any negotiation between the parties and without detailed information on what is being placed before the Commission for arbitration or decision.

Finally, MCI references a Michigan Commission's Decision on what MCI asserts is the same issue as Issue UNE 5 here. MCI Ex. 14.0 at 14. However, Mr. Starkey's reference to this proceeding is incomplete. For example, he does not supply the language proposed by MCI or SBC in that proceeding, but rather

provides a hyperlink to the Michigan Commission's website. From what Staff could discern MCI appears to have misrepresented the Michigan proceeding. It does not appear, as MCI asserts, that SBC proposed in Michigan to include the language that it does in this proceeding (i.e., MCI may not use SBC ILLINOIS's Lawful unbundled Network Elements to provide services to other Telecommunications Carriers.) See Document 0046 at <http://efile.mpsec.cis.state.mi.us/cgi-bin/efile/viewcase.pl?casenum=13758> and MCI Ex. 8.0 at 47. Thus, it appears that this issue was not directly addressed by the Commission in Michigan (although an issue comparable to Issue DEF 2 was).

Nevertheless, while the Michigan Commission was not apparently asked to consider the language proposed here, it did comment, as MCI notes, on its belief regarding resale limitations that SBC might impose on telecommunications carriers requesting its UNEs. While there is little discussion in the Michigan Order, it appears that the Michigan Commission made a determination that telecommunications carriers could in some instances be end users or members of the public. MCI Ex. 14.0, Attachment MS-3, at 7. However, Staff conjectures (as it must because MCI has supplied no evidence) that telecommunications carriers that take service from MCI do so overwhelmingly if not exclusively in order to supply telecommunications service to other end user customers or members of the public and not as end user customers or members of the public themselves. This Commission has determined that, under certain circumstances, SBC is not required to provide UNEs to MCI when MCI intends to use them to provide such resale services. Thus, the possibility that MCI might supply phone service to AT&T's corporate office does not in Staff's estimation make MCI's proposal, which would provide MCI the unlimited ability to provide UNE based services to other telecommunications providers for the purposes of resale, the more acceptable proposal.

33. UNE Issues 6-8

Statement of Issues: Issue 6 - Which party's definition of "Qualifying Service" and "Non-Qualifying Service" are in accordance with the FCC's requirements and should be included in the Agreement?

Issue 7 – MCI - In defining "Qualifying Services," should the contract include SBC Illinois' proposed definition of "Common Carrier" from *NARUC II*?

Issue 7 - SBC - In defining "Qualifying Services", should MCI be permitted to use unbundled Network Elements for internal, administrative use only, or should they be providing those services on a common carrier basis?

Issue 8 - Should SBC ILLINOIS' additional terms and conditions for Qualifying Service be included in the contract?

Both parties take positions with respect to these issues that if the Commission considers the DC Circuits USTA II decision, that Section 3 of the Appendix XXIII, Unbundled Network Elements (UNE) should be removed from the ICA.

In the recently concluded XO Arbitration, a Commission Administrative Law Judge (“ALJ”) recently determined that:

... the inescapable fact is that USTA II modifies and nullifies portions of the TRO. The latter cannot be properly interpreted or implemented without reference to the former. Therefore, even if USTA II, qua USTA II, were excluded from negotiations, its impact on the TRO would have to be incorporated in the Commission’s analysis of the issues properly presented for arbitration.

Administrative Law Judge Ruling at 2, In the Matter of: Petition for Arbitration of XO Illinois, Inc. Of an Amendment to an Interconnection Agreement with SBC Illinois, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, ICC Docket No. 04-0371(June 24, 2004).

Each of these issues, like those in the XO Arbitration, concerns the implementation of TRO provisions that were modified or nullified by USTA II. Therefore, the ALJ’s determination in the XO Arbitration is as appropriate and applicable to this arbitration as it was in that proceeding, and the Commission should not depart from that decision here. Furthermore, there is no question that both parties have incorporated USTA II into their positions because both parties present positions based in whole or in part on USTA II.

The Commission should make its determinations in this proceeding taking full account and consideration of USTA II and, therefore, should order the removal of Section 3 of the Appendix XXIII, Unbundled Network Elements (UNE) from the ICA. Staff IB, at 47; Staff RB, at 43.

34. UNE Issue 9

Statement of Issue: MCI - Since the contract clearly specifies the extent of SBC Illinois’ obligation to provide access to UNEs, is it necessary to include a disclaimer concerning what SBC ILLINOIS is not obligated to provide?

SBC - Should the UNE appendix limit SBC Illinois’ obligation to provide UNEs or UNE combination to only that required by Applicable Law?

SBC's proposed language for UNE Section 3.7 should be rejected. Staff IB, at 47, *citing* Staff EX. 1.0 (Hoagg) at 20. In addition to its Section 251 obligations, SBC is obligated to provide unbundled elements pursuant to Section 271 of the Act and Section 13-801 of the PUA. Id.

35. UNE Issue 11

Statement of Issue: SBC - Should the UNE Appendix describe Declassified elements?

MCI - Should SBC's proposed UNE declassification procedures be included in the agreement?

The Commission should adopt Staff's recommendation concerning UNE Issue 2 as the appropriate resolution of UNE Issue 11.

Staff recommends that the agreement specifically identify those elements that have been "Section 251 declassified". Staff IB, at 47-48, *citing* Staff EX. 1.0 (Hoagg) at 22. However, SBC's proposed revisions and additions as set forth in UNE Issue 11 should be rejected. Id. At a minimum, these provisions do not reflect SBC's obligations for the "interim period" under the FCC's Interim Order, as clearly contemplated by the FCC. Nor do these proposals reflect SBC's obligations to provide unbundled elements under Section 271 of the 1996 Act and Section 13-801 of the Illinois PUA. Id. Finally, contract change of law provisions should continue to apply in circumstances surrounding potential future Section 251 declassifications.

36. UNE Issue 12

Statement of Issue: SBC -Should the UNE Appendix contain details concerning the transitional plan for declassified elements?

MCI - Should SBC's proposed UNE declassification procedures be included in the agreement?

SBC's proposed revisions and additions as set forth in UNE Issue 12 should be rejected. Staff IB, at 48-49, *citing* Staff EX. 1.0 (Hoagg) at 25. These proposals do not properly reflect SBC's obligations to provide unbundled elements under Section 271 of the 1996 Act and Section 13-801 of the Illinois PUA, and are thus fundamentally flawed. Id. The apparent premise underlying SBC's proposed language is that Section 251 declassification may result (under certain circumstances) in SBC discontinuing its provisioning of the element in question. Id. As a general matter, this cannot lawfully occur. Id. Rather, the fundamental effect of "Section 251 declassification" is that any element(s) involved no longer need be provisioned at TELRIC prices. Id.

Appropriate administrative/operational processes to occur upon Section 251 declassification of a network element are addressed in the Commission's *XO Arbitration Decision*. The basic conclusions reached therein are as follows:

First, the amended ICA should have a standard procedure for implementing TRO-related changes in unbundling obligations. Second, as previously discussed, any such future changes must be identified through the current change-of-law and dispute resolution procedures in the ICA. Third, absent agreement by the parties, no change in unbundling obligations can be implemented in less than 60 days after service of written notice by the party demanding implementation. Fourth, the party serving such notice may either implement change unilaterally or request a Commission order requiring implementation. XO Arbitration Decision at 57

In Staff's view, the processes the Commission adopted in the *XO Arbitration Decision* are appropriate. See Staff IB, at 49; Staff Ex. 1.0 (Hoagg) at 26 (recommending adoption of identical provision of Proposed Order in the same proceeding). Staff recommends, however, that the Commission consider two departures from this proposal. Id. First, since the most significant impact of Section 251 declassification generally concerns the pricing of a network element, it may be that a maximum 30-day implementation period (post proper notification) is sufficient (as opposed to the 60 day period recommended in the *Arbitration Decision*). Id. Second, these conclusions contained in the *Arbitration Decision* do not reflect the two specific exceptions Staff recommends above to the usual workings of a change of law provision. Id.

37.

38. UNE Issue 13

Statement of Issue: MCI - Are there eligibility requirements that are applicable to the conversion of wholesale services to UNEs?

SBC - When converting wholesale services to UNE, what should the contract specify regarding eligibility criteria and qualifying service requirements?

SBC takes the position that it should be specified that UNEs included in converted combinations must meet eligibility criteria defined elsewhere in the contract. 8/10/04 DPL, Issue UNE 13. MCI opposes SBC's language asserting that SBC's reference to eligibility criteria is vague and could result in SBC refusing to convert services without just cause. 8/10/04 DPL, Issue UNE 13 and MCI Ex. 8.0 at 74.

Eligibility criteria for Section 251 UNEs and UNE combinations are applicable whether those UNEs are the product of a conversion or the product of

SBC work to combine previously unconnected UNEs. If SBC attempts to improperly impose eligibility criteria, MCI can, as it presumably would, seek dispute resolution or other remedial measures.

MCI asserts that this position does not address vagaries contained in SBC's language. MCI Ex. 14.0 at 20-22. MCI appears to object to *any* eligibility criteria for conversions recommended by SBC. MCI IB at 74. However, some eligibility requirements for conversions are called for. Eligibility criteria for Section 251 UNEs and UNE combinations are applicable whether those UNEs are the product of a conversion or the product of SBC work to combine previously unconnected UNEs. Staff Ex. 6.0 (Zolnierek) at 20. If SBC attempts to improperly impose eligibility criteria, MCI can, as it presumably would, seek dispute resolution or other remedial measures. Staff RB, at 43.

The Commission should accept SBC's proposal to include language in the ICA referencing eligibility criteria that are applicable to combinations. However, the Commission should reject the last sentence of SBC's proposed language, which contains SBC's example referring qualifying services eligibility criteria vacated by USTA II. Staff IB, at 50.

39. UNE Issue 14

Statement of Issue: What processes should apply to the conversion of wholesale services to UNEs?

SBC takes the position that it should provision conversions under its existing processes except where it does not have existing processes to provision a particular combination. When these conversions are identified, SBC will develop and implement such processes, and the parties will comply with the Change Management guidelines. 8/10/04 DPL, Issue UNE 14.

MCI proposes that a conversion process, including certain provisioning intervals and processes, to be uniquely applied to MCI. 8/10/04 DPL, Issue UNE 14. MCI argues that SBC's existing processes are deficient, and that MCI's proposals would place contractual obligations on SBC that would result in more timely and efficient provision of service by SBC. MCI Ex. 8.0 at 76-77.

Based on the absence of specific information supporting MCI's proposal Staff recommended that MCI should use SBC's existing conversion processes and the parties should work in collaboration with the industry to develop provisioning processes where they do not exist today. While MCI can argue for a timely process and one that fits its business needs, the development of a unique process for each carrier purchasing similar services and products is, without some identifiable justification, unnecessarily duplicative and a waste of resources.

In response to Staff's request for more information, MCI provided further explanation for its position – arguing that its proposal finds support in TRO direction on this issue. However, MCI's arguments are misleading and wrong.

With respect to MCI's proposed thirty (30) day provisioning interval, MCI witness Starkey states: "As I explained on page 75 of my direct testimony, MCI's proposed thirty (30) day interval is designed so that the rate change that will result from the conversion is recognized in the next billing cycle following the conversion request." MCI Ex. 14.0 at 26. This is, however, a false statement. As can easily be seen from Mr. Starkey's direct testimony, he did not, as he claims, explain the basis for MCI's thirty (30) day interval proposal in his direct testimony at page 75 -- or for that matter anywhere else in his direct testimony.

In his rebuttal testimony, Mr. Starkey for the first time argues that MCI developed its thirty (30) day interval so that the rate changes will be recognized within a single billing cycle. This explanation is deficient for two reasons. First, a condition requiring rate changes within a thirty (30) day interval is not precisely the same as a condition that rate changes are recognized within a single billing cycle. Second, based on Mr. Starkey's explanation, MCI's thirty (30) day interval is at best redundant and at worst inconsistent with its proposal to include the statement "[u]nless otherwise agreed to in writing by the Parties, such conversion shall be completed in a manner so that the correct charge is reflected on the next billing cycle after MCI's request." MCI Ex. 14.0 at 23.

MCI argues that the most convincing source of information supporting MCI's proposal is the TRO. MCI Ex. 14.0 at 22. MCI states "the FCC found that price changes should, and by implication can, be reflected starting with the next billing cycle following the conversion request." MCI Ex. 14.0 at 22. However, if this is MCI's most convincing source of support, then MCI's position is decidedly unconvincing. The FCC was very clear that time frames for conversions are best established through negotiations between incumbent LECs and requesting carriers, a fact that MCI cites. MCI Ex. 14.0 at 22. Nevertheless, MCI argues that the FCC's TRO prescribes provisioning intervals --- despite the fact that such prescriptions would obviate the need for the negotiations that the FCC calls for. This is simply a misreading of the FCC's pronouncements.

Similarly, MCI asserts that its thirty (30) day provisioning interval is driven by the fact that the FCC established that conversions are a billing function. MCI Ex. 14.0 at 24. However, this ignores the FCC's characterization of conversions as "largely" a billing function. MCI Ex. 14.0 at 22. That is, the FCC stated certain general perceptions of the work being performed. The FCC did not, however, conclude that these perceptions were correct in every instance. In fact, as the passage cited by MCI reveals, the FCC refused to establish specific provisioning intervals.

Staff does agree with the FCC's general observation that converting between wholesale services and UNEs is likely to be largely a billing function. Nevertheless, this conventional wisdom does not imply that it is solely a billing function in every instance or that the FCC's guidance in circumstances in which such provisioning is only a billing function is appropriate in every instance. MCI essentially omits any facts and rests its entire position on the premise that the FCC order obviates the need for any facts and, in fact, prescribes the terms and conditions under which conversions are to occur. This is simply incorrect. The FCC, consistent with good policy, concluded that specific provisioning criteria are best established between the parties with the most knowledge of how provisioning actually occurs and not based on its general observations. Consistent with this, good policy dictates that when the parties cannot agree the Commission should not make determinations based on the general observations of the FCC, but on the actual facts relevant to the provisioning of such conversions.

MCI concedes that it has offered a proposal that ignores SBC's current provisioning process and instead creates a provisioning system unique to MCI. MCI Ex. 14.0 at 24. However, MCI supports this with nothing apart from reference to the FCC's general observations.

MCI argues that its language will allow SBC some relief from its proposed thirty (30) day provisioning interval when MCI asks for an "other conversion" – although an explanation of what an "other conversion" is appears nowhere in MCI testimony or its proposed language. However, MCI's argument does not appear to reflect its position. MCI's position appears to be specifically that "...if the yet-to-be-defined conversions consist of a largely billing change, as described in ¶ 588 of the TRO, then they should be provided within the thirty (30) day timeframe." This is consistent with MCI's language, which specifies that all conversions (including "other conversions") must be completed so that the charges are reflected in the next billing cycle. Thus, MCI's claim that its proposal somehow grants relief from its proposed provisioning intervals for first time conversion requests, a claim apparently offered to make the MCI proposal look "reasonable" does not appear consistent with MCI's proposed language.

In sum, MCI neglects to mention, see MCI IB at 75, that there are conversion processes in place now for most conversions, and a change management process to effectuate new ones. Staff Ex. 6.0 (Zolnierek) at 21-22. The Staff recommends that the Commission reject MCI's proposal to include language in the ICA that would require SBC to depart from its existing processes for the provisioning of conversions of wholesale services to UNEs. Staff RB, at 43.

40. UNE Issue 17

Statement of Issue: MCI - See UNE issue 2. (MCI's UNE Issue 2 Statement: what procedures apply when there has been a change of law

event affecting the obligation the obligations to provide UNEs?)

SBC Illinois - Should the obligation to commingle be restricted to the extent required by FCC's rules and orders?

SBC takes the position that its language stating that it must commingle "to the extent required by FCC rules and orders" clarifies that any commingling obligations exist "because of, and therefore, to the extent of, regulatory rule." 8/10/04 DPL, Issue UNE 17.

MCI takes the position that SBC's language would have the effect of subverting change of law provisions in instances in which a change in law event effects unbundling obligations (MCI proposes that such change of law events be effectuated through the negotiation and amendment process in Section 23 of the GT&C portion of the interconnection agreement)." 8/10/04 DPL, Issue UNE 17.

No party has argued that commingling is a requirement that arises from state law. In fact, the Commission declined to require SBC to commingle UNEs with wholesales services in its Section 13-801 Implementation Order. Therefore, any obligation to provide commingling, and the rates, terms, and conditions for commingling are, for purposes of this proceeding, governed by the TRO. Accordingly, SBC's statement that it must commingle "to the extent required by FCC rules and orders" simply reflects the current state of the rules and regulations.

Regarding MCI's concern that SBC's language grants SBC unilateral change-of-law rights, a plain reading of SBC's proposed language suggests no such thing. However, the Commission can presumably resolve this matter to the satisfaction of both parties by simply clarifying that its acceptance of SBC's proposal is premised on the understanding that it does not confer on SBC any unilateral change-of-law rights, and clarifying that in the event of a state or federal law changes with respect to commingling, either party is entitled to invoke the contracts change of law provisions. Staff IB, at 51.

The Commission should accept SBC's proposal to include language in the ICA that specifies that SBC must commingle to the extent required by FCC rules and orders. The Commission should specify that its acceptance of SBC's proposal is premised on the understanding that it does not confer on SBC any unilateral change-of-law rights and that, in the event of a state or federal law changes with respect to commingling, either party is entitled to invoke the contracts change of law provisions. Staff IB, at 51.

41. UNE Issues 18 and 23

Statement of Issues: 18 - Should the definition of Commingling include wholesale services purchased “pursuant to any method other than unbundling under Section 251(c)(3)”?

23 - Is SBC Illinois obligated to allow commingling of section 271 checklist items?

SBC argues that MCI’s language, which defines commingling to include a combination of “Lawful UNEs” and wholesale services purchased “pursuant to any method other than unbundling under Section 251(c)(3)”, promotes ambiguity and will lead to future disputes, and that SBC does not have to permit commingling of UNEs obtained pursuant to Section 251 of the 1996 Act with wholesale products and services obtained pursuant to Section 271 of the 1996 Act. 8/10/04 DPL, Issue UNE 18 and Issue UNE 23. SBC supports its position by citing to a TRO errata. SBC Ex. 21 at 22-23.

MCI argues that its proposed language which defines commingling to include a combination of “Lawful UNEs” and wholesale services purchased “pursuant to any method other than unbundling under Section 251(c)(3)”, “tracks the FCC’s regulation precisely and that SBC is required to permit commingling of UNEs obtained pursuant to Section 251 of the 1996 Act with wholesale products and services obtained pursuant to Section 271 of the 1996 Act. 8/10/04 DPL, Issue UNE 18 and Issue UNE 23. MCI argues that “[t]he same rationale that justifies commingling of local and access traffic applies to all sorts of commingling, including commingling of traffic on facilities leased under sections 251 and 271.” MCI Ex. 6.0 at 8.

The FCC did issue an errata removing a reference to the obligation that ILECs have to permit commingling of Section 271 items with Section 251 UNEs. The relevant passage, in strikeout form, states:

As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including ~~any network elements unbundled pursuant to section 271~~ and any services offered for resale pursuant to section 251(c)(4) of the Act. Errata, ¶ 31, TRO Order (Sept. 17, 2003).

This errata removed a passage that would have clearly required ILECs to permit commingling of Section 271 items with Section 251 UNEs.

The FCC released a second errata at the same time. The relevant passage, in strikeout form, states:

We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). ~~We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.~~
Id.

This section removed a passage that would have clearly relieved ILECs of the obligation to permit commingling of Section 271 items with Section 251 UNEs.

Examination of both changes reveals that the FCC did not make it clear that SBC is not required to permit commingling of 251 UNEs and 271 items. Instead, the countervailing changes make it clear that the FCC removed contradictory statements in its order and the result is a post-errata TRO that does not explicitly speak to whether SBC is or is not required to permit commingling of Section 271 items with Section 251 UNEs. Thus, the FCC declined the opportunity to clarify its own rules in this regard.

It would be inconsistent with rationale cited by the FCC for instituting its commingling rules to require MCI to provision services over separate and distinct facilities if it elected to use both Section 251 UNEs and Section 271 UNEs to provide services to a customer. In addition, permitting SBC to deny those carriers seeking access to Section 271 items corresponding access to Section 251 loops would provide SBC with the ability to leverage control over a network element, the voice-grade loop, which has met the "necessary and impair" standards of Section 251(d)(2). In essence MCI would be forced to relinquish its right to obtain network elements under Section 251 in order to exercise its rights to obtain network elements under Section 271, a result that is clearly contradictory with Section 271 requirements of ILECs to both provide certain specific network elements and to comply with Section 251(c)(3).

In addition, MCI's proposed definition of commingling is consistent with, and derives from, the FCC's definition of commingling in the TRO. Staff IB, at 51. However, it does not follow that because a combination of a Section 251 UNE and a wholesale service is defined as commingled arrangement, SBC is therefore necessarily required to provide such a commingled arrangement to MCI.

The Commission should accept MCI's proposed definition of commingling for inclusion in the ICA because MCI's proposed definition is consistent with, and derives from, the FCC's definition of commingling in the TRO. The Commission should specify, however, that defining a combination of a Section 251 UNE and a

wholesale service as a commingled arrangement does not necessarily imply that SBC must offer that commingled arrangement to MCI.

The Commission should further order the parties to include language in the ICA specifying that SBC is required to permit commingling arrangements of Section 251 UNEs and Section 271 items. Staff IB, at 52.

42. UNE Issue 19

Statement of Issue: Under what circumstances is SBC ILLINIOS obligated to perform the functions necessary to carry out commingling?

SBC proposes to limit instances in which it will perform the work to actually complete a commingling combination based upon limitations it asserts the U.S. Supreme Court imposed in its Verizon v. FCC decision. 8/10/04 DPL, Issue UNE 19. In particular, SBC proposes:

...SBC shall have no obligation to perform the functions necessary to Commingle (or to complete the actual Commingling) where “(i) MCI is able to perform those functions itself; or (ii) it is not technically feasible, including that network reliability and security would be impaired; or (iii) SBC Illinois’ ability to retain responsibility for the management, control, and performance of its network would be impaired; or (iv) SBC Illinois would be placed at a disadvantage in operating its own network; or (v) it would undermine the ability of other Telecommunications Carriers to obtain access to Lawful UNEs or to Interconnect with SBC Illinois’ network; or (vi) CLEC is a new entrant and is unaware that it needs to Commingle to provide a telecommunications service, but such obligation under this Section ceases if SBC ILLINOIS informs MCI of such need to Commingle.

SBC Ex. 7.0 at 16. SBC argues that the FCC’s commingling rule “uses the same language” as the FCC’s combination rule and, therefore, the restrictions imposed by the Supreme Court in the Verizon decision should apply equally to both combining and commingling. SBC Ex. 7.0 at 16.

MCI takes the position that SBC must include language stating that it will perform the work to actually complete a commingling combination without qualifying this language with SBC’s proposed list of limitations. 8/10/04 DPL, Issue UNE 19. MCI argues that (i), (iii), (iv), and (vi) have no basis in the TRO and that exception (ii) and (v), while based on the TRO, should be excluded to avoid cluttering up the contract.

In the TRO, the FCC states:

We reiterate the conditions that apply to the duty of the incumbent LECs to provide UNE combinations upon request, i.e., that such a combination must be technically feasible and must not undermine the ability of other carriers to access UNEs or interconnect with the incumbent LEC's network. As noted in the Verizon decision, the limitation on technical feasibility is meant to preserve the reliability and security of the incumbent LEC's network, and a UNE combination is 'not technically feasible if it impedes an incumbent carriers ability to retain responsibility for the management, control, and performance of its own network. Incumbent LECs must prove to state commissions that a request to combine UNEs in a particular manner is not technically feasible or would undermine the ability of other carriers to obtain access to UNEs or to interconnect with the incumbent LEC's network. TRO, ¶ 574.

Therefore, SBC's proposed conditions (ii), (iii), and (v) appear entirely consistent with the FCC's rules and regulations.

With respect to condition (i), the Commission has decided any question of whether SBC's restriction is appropriate. That is, the Commission has determined that "[t]here is no exception to the combination requirement where ILECs assert that CLECs can do the combining themselves. The FCC was clear: upon request, the ILEC must do the combining." Commission Brief in AT&T/SBC Arbitration Court Case at 49 (citations omitted). Condition (iv) is an open ended and somewhat ambiguous constraint that might be interpreted as allowing SBC to limit commingling obligations based on, for example, profitability concerns, and should be rejected. Similarly, because condition (vi) would permit SBC to refuse to combine UNEs if it informs a new entrant that it needs to perform the work to combine network elements condition (vi) should be rejected.

Finally, lest there be any doubt, in Verizon v. FCC, 535 U.S. 467; 122 S. Ct. 1646; 152 L. Ed. 2d 701; 2002 U.S. Lexis© 3559; (2002), the Supreme Court held that:

[T]he First Report and Order makes it clear that what is "technically feasible" does not mean merely what is "economically reasonable," or what is simply practical or possible in an engineering sense. The limitation is meant to preserve "network reliability and security," and a combination is not technically feasible if it impedes an incumbent carrier's ability "to retain responsibility for the management, control, and performance of its own network. Verizon v. FCC, 535 U.S. at 536, 122 S. Ct. at 1685, 152 L.Ed.2d at 752-53 (internal citations omitted)

Accordingly, SBC need not conduct commingling work when it (1) is infeasible, including tending to impair network reliability; or (2) impairs SBC's ability to retain responsibility for the management, control, and performance of its own network. This means that SBC's proposed conditions (ii), (iii), and (v) are proper. Staff Ex. 6.0 (Zolnierek) at 38. The remainder are not. Staff RB, at 44.

43. UNE Issue 20 and 24

Statement of Issues: 20 - Is the BFR the appropriate vehicle for submitting certain commingling requests?

24 - What processes should apply to commingling requests?

SBC takes the position that Requests for commingled arrangements not captured by the processes it is currently designing should be requested through the bona-fide request ("BFR") process and that requests for additional arrangements (ones that have been provisioned through the BFR process) should be developed and implemented through the change management process. SBC IB, at 95-96.

MCI takes the position that the BFR process is not appropriate for ordering commingled arrangements and proposes to submit spreadsheets with orders and to impose on SBC a 14-day provisioning interval for processing requests for unanticipated (or not previously requested) commingling arrangements. 8/10/04 DPL, Issue UNE 20 and Issue UNE 24.

Neither party offers any evidence that would allow the Commission to decide between the parties' positions. On one hand, SBC offers proposal that might (and currently would) provide for nonstandard treatment of standard requests. That is, while SBC is designing a non BFR process to accommodate some requests, it has no process in place for any commingling requests at this point and has offered no information on what commingling requests would be included in the process it is designing. On the other hand MCI offers a proposal that imposes a provisioning interval that could be infeasible, or impossible for SBC to meet. For this reason SBC should be permitted 30 days, the time it takes to do its initial analysis under the BFR process, to come up with rates, terms, and conditions for commingling requests. Staff IB, at 53.

This proposal is directed only at initial requests. MCI raises the further issue of what constitutes an initial request. MCI Ex. 12.0 at 10-11. Staff takes the position that the burden for determining whether a request is an initial request should fall on both parties. While Staff acknowledges that this recommendation, if accepted, would do little more than provide general guidance to the parties on how to approach requests for commingling relationships, neither the Commission or the Staff are in a position to offer further detail. The parties have failed to identify any specific configurations at issue and, like SBC (see SBC Illinois Ex.

7.1 at 6), Staff cannot begin to guess (and advises the Commission against guessing) what those configurations will look like and how similar or dissimilar they will be from one another with respect to provisioning. When and if an actual dispute arises that the parties cannot resolve based on the guidance above then the Commission will be better equipped to provide specific guidance.

SBC's assertion that Staff's proposal is not appropriate because SBC will only subject to the BFR process requests for commingled arrangements that are not currently available should be rejected. SBC Illinois Ex. 7.1 at 7. SBC asserts that it will not apply the BFR process to requests for commingled arrangements that are commonplace. SBC Illinois Ex. 7.1 at 7-8. However, the plain fact is that SBC currently has no process, apart from the BFR process, in place for processing any commingled arrangements. Thus, at this time all requests would under SBC's proposal be subject to the BFR process. Staff and the Commission are simply not in the position to speculate as to what processes might result from SBC's current development efforts – expected results that even SBC is apparently unable to supply at this time.

SBC proposes to extend provisioning intervals in order to provide it time to consider the legality of requests for commingled arrangements. SBC Illinois Ex. 7.1 at 8 (“Moreover, in light of legal developments, such as the TRO and USTA II decisions, affecting the classification of network elements as UNEs, there will be a review of each request for a network element to determine whether or not the element is even available as a UNE, much less at what terms or conditions.”). This request should be denied. Certainly, SBC is entitled to conduct such a review. However, the Commission should not permit SBC to construct physical provisioning intervals based on the work of its legal staff, workers that should play no part in the physical provisioning of the products SBC is required to provide under law.

Finally, SBC argues that it cannot say at this time that requests can be processed in less than 120 days. SBC Illinois Ex. 7.1 at 9. Staff does not dispute this fact. SBC clearly is unable to provide any specifics regarding the processing of such requests at this time. However, SBC's argument fails to account for the fact that Staff's proposal does not provide an absolute limit of 30 days on SBC's response to a request for commingling. Rather, Staff specifically proposes that “in circumstances where [SBC] cannot respond to a request in 30 days, SBC bear the burden of proof of demonstrating why it cannot feasibly do so.” ICC Staff Ex. 6.0 at 50. SBC has offered no reason for its objection to this part of Staff's proposal. SBC should be granted extra time when circumstances dictate that extra time is needed. However, SBC has offered no explanation for why it should not be held accountable to explain its need for extra time.

The Commission should order the parties to include language in the ICA that requires SBC to, within 30 days of a request, develop rates, terms, and conditions for provisioning of an initial commingling request and to provide those

rates, terms, and conditions to MCI. The Commission should also direct the parties to include language in their agreement specifying: (1) that in circumstances where SBC cannot respond to a request in 30 days, SBC bears the burden of proof of demonstrating that it cannot feasibly do so; (2) that SBC bears the burden of proving that its rates, terms, and conditions, including provisioning intervals, are consistent with all applicable laws, rules and regulations; and (3) that the burden is shared by both parties to identify requests that are repeat, rather than initial, requests.

With respect to the general guidance to the parties contained in the later directive, the Commission should specify that the parties have failed to identify any specific configurations at issue and/or disputes resolving those configurations and that it cannot begin to guess what those configurations will look like and how similar or dissimilar they will be from one another with respect to provisioning. Therefore, the Commission is in no position to offer more specific direction. To account for any disagreements between the parties with respect to any specific commingling scenarios that might arise in the future that the parties cannot resolve based on the dispute resolution mechanisms in the ICA, the Commission should order the parties to include language in the ICA that would permit the parties to bring these disputes to the Commission for resolution. Staff IB, at 53-54. Regarding the format of requests, the Commission should order the parties to include language in the ICA that specifies that requests be submitted in BFR format, rather than in MCI's spreadsheet format. Staff IB, at 54.

In short, MCI's proposal – that commingling arrangements must be provisioned within 14 days, MCI Ex. 6.0 (Price) at 12-14 – is clearly unreasonable, as is SBC's proposal that the *bona fide* request (BFR) process, taking up to 120 days, be used. Staff Ex. 6.0 (Zolnierek) at 47. Staff's 30-day proposal is clearly the most reasonable, and should be adopted. Staff RB, at 44.

44. UNE Issue 21

Statement of Issue: Which Party's "ratcheting" proposal should be included in this agreement?

SBC proposes language regarding how non-UNE portions of commingled arrangements would be addressed. 8/10/04 DPL, Issue UNE 21.

MCI's language specifies that SBC is not allowed to deny access to UNEs for the reason that those UNEs share a part of SBC's network with access or other non-UNEs. 8/10/04 DPL, Issue UNE 21.

The parties have expressed no disagreement here with respect to the identified issues. MCI has not expressed disagreement, and Staff agrees with

SBC, with respect to the notion that SBC will be permitted to bill for non-UNE elements that are part of commingled arrangements. Similarly, SBC has not expressed disagreement with MCI, and Staff agrees with MCI, that SBC is prohibited from denying MCI UNEs because of the FCC's directives on ratcheting.

The Commission should accept the proposed language submitted by both parties for this issue. In particular the Commission should accept SBC's language regarding billing for non-UNE elements and MCI's language regarding the relationship between FCC ratcheting pronouncements and denial of commingled arrangements. To the extent this recommendation is unclear with respect to MCI's proposed language (see MCI Ex. 12.0 at 12) Staff clarifies that it does recommend, as MCI suggests, that MCI's language at the end of Section 7.5.1 be included in the agreement. Staff IB, at 54.

45. UNE Issue 22

Statement of Issue: Which Party's proposal about tariff restrictions should be included in the Agreement?

The Commission should reject the proposed language of both parties with respect to this issue. Specifically the Commission should reject MCI's proposed language that would govern the rates, terms, and conditions of SBC's federal tariffs. Here, MCI essentially seeks a Commission order imposing conditions on the application of SBC's federal access tariffs. MCI Ex. 6.0 (Price) at 16-17. The Commission should not make any judgment regarding the applicability of a tariff in a Section 252 arbitration, where many affected parties have no right to be heard. Accordingly, MCI's proposal should be rejected. Staff RB, at 45. The Commission has no authority to impose conditions on the application of SBC's federal tariffs, in particular its federal access tariffs, through its Section 252 arbitration authority. The Commission should also reject SBC's proposal to reference its federal tariffs as the purpose of this reference is neither explained nor identifiable. Staff IB, at 54-55.

46. UNE Issue 25

Statement of Issue: What should the scope of commingling obligations be?

The connection of Section 251 UNEs or UNE combinations with MCI facilities falls under the FCC's UNE combination and not commingling rules. 47 C.F.R. § 51.315(d). Similarly, the Commission, while ruling that SBC need not commingle UNEs and wholesale services, determined that "Section 13-801(c) plainly requires [SBC] to allow, and provide for, cross connects between a noncollocated telecommunications carrier's transport facilities, and the facilities of any collocated carrier, consistent with safety and network reliability standards."

Section 13-801 Implementation Order, at 30, 85. Thus, as a definitional matter both the FCC and Commission do not treat combinations of Section 251 UNEs and combinations of UNEs and a CLECs own or a third party's facilities as commingling arrangements.

The Commission should reject MCI's proposal to include language specifying that SBC must commingle 251 UNEs with MCI or third party facilities, as these combinations are not properly defined as commingled arrangements. Staff IB, at 55-56.

47. UNE Issue 31

Statement of Issue: SBC - Should any language obligating SBC Illinois to unbundle broadband services be included in the Agreement?
MCI - Should SBC be required to make hybrid loops available to MCI in a manner that permits MCI to provide broadband services over that loop?

Staff recommends that SBC's initially proposed additional language be rejected. Staff recommends that the Commission adopt the following additional language (which faithfully reflects the requirements of the TRO):

SBC Illinois is not required to provide MCI with unbundled access to any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Nor is SBC Illinois required to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops.

FCC Rule 51.319(a)(2)(ii) sets forth the requirements for access to hybrid copper/fiber loops:

Broadband services. When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (where impairment has been found to exist), on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop

that are not used to transmit packetized information. Staff IB, at 56, *citing* 47 C.F.R. §51.319(a)(2)(ii)

The meaning of this rule is clarified in the TRO as follows:

The rules we adopt herein do not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Moreover, the rules we adopt herein do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market. TRO, ¶288.

The FCC provides further clarification regarding CLEC right of access to non-packetized features and functionalities of hybrid loops in the following passage:

[this decision] does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers. These TDM-based services – which are generally provided to enterprise customers rather than mass-market customers – are nonpacketized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs. Staff IB, at 56-57 *citing* TRO, ¶288

Consequently, in light of the FCC's rules and guidance provided in the TRO, the Staff recommends that the Commission adopt its proposal as being the most consistent with FCC requirements.

48. UNE Issues 71 and 72

Statement of Issue: MCI 71 - Which party's combination language should be included in the Agreement?

SBC 71 - See UNE Issue 72 and 73.

MCI 72 - See UNE Issue 71.

SBC 72 -Should SBC ILLINOIS be required to provide UNE combinations where MCI is able to make the combination itself, or other than as specified in the TRO?

SBC proposes language that limits its obligation to combine UNEs and permitting it to take apart UNE combinations. SBC IB, at 81-85; 8/10/04 DPL, Issue UNE 71 and 72. MCI proposes language that eliminates SBC's limitations and removing SBC's discretionary authority to take apart UNE combinations. 8/10/04 DPL, Issue UNE 71 and 72.

SBC should be able to separate network elements, particularly where such separation is required to allow SBC to provision alternative combinations or other offerings. SBC's should not, however, be able to separate network elements that it anticipates CLECs will request as a part of a combination of network elements prior to receiving the request from the CLEC for this combination. Staff RB, at 24.

Regarding when it will it perform the work to complete a combination, the Commission should order the parties to include language in the ICA that includes SBC's proposed limitations relieving SBC of performing this work when: (1) it is not technically feasible, including that network reliability and security would be impaired; or (2) SBC Illinois' ability to retain responsibility for the management, control, and performance of its network would be impaired; or (3) it would undermine the ability of other Telecommunications Carriers to obtain access to Lawful UNEs or to Interconnect with SBC Illinois' network. The Commission should reject SBC's proposal to include language in the ICA relieving SBC of performing this work when: (1) MCI is able to perform those functions itself; or (2) SBC Illinois would be placed at a disadvantage in operating its own network; or (3) SBC informs a new entrant that it needs to commingle to provide a telecommunications service. Staff RB, at 24-25.

The Commission should further require the parties to include in their agreement language assigning the burden of proof to SBC regarding circumstances where combining is technically infeasible or would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network. Staff RB, at 25.

The Commission should accept SBC's proposal to include language in the ICA that permits SBC to control its own network and operations by allowing SBC to separate network elements. Staff RB, at 25. However, the Commission should order the parties to amend the language proposed by SBC to state that SBC may not separate network elements based on its anticipation that MCI will request the combination (for example, based on MCI's request for preorder information). See UNE Issue 19 (above).

49. SBC UNE Issue 1

Statement of Issue: Should SBC Illinois be required to provide DS1, DS3, or higher capacity loops as an unbundled TELRIC-priced offering?

50. SBC UNE Issue 3

Statement of Issue: Should SBC Illinois be required to provide unbundled Local Switching (ULS), Shared Transport, and associated call-related databases and functions as TELRIC-priced offerings?

51. SBC UNE Issue 4

Statement of Issue: Should SBC Illinois be required to provide Dedicated Transport as an unbundled TELRIC-priced offering?

The Staff recommends that the Commission reject SBC's proposed language for each of these issues. The FCC's Interim Order requires that SBC make available, at least during an initial "interim period", each of the above-named unbundled elements at TELRIC rates, with the following exceptions: the Staff agrees with SBC that loops and dedicated transport at OCn capacity levels have been declassified as Section 251 UNEs, and thus need not be provided at TELRIC rates. Staff IB, at 60-63.

The Staff endorses SBC's proposal to codify its obligations regarding these elements under the FCC Interim Order in a Rider attached to the ICA. The Staff notes, however, that SBC also remains obligated to provide each of the above-named elements pursuant to requirements of PUA Section 13-801 (albeit at non-TELIC prices). The Staff believes that these obligations must be set forth in the ICA itself, rather than in a Rider to the ICA. At the same time, the Staff recommends that the Commission duly consider any proposal SBC may advance to satisfy its PUA Section 13-801 obligations through a vehicle other than this interconnection agreement (e.g., through tariffs, SGAT or other alternative mechanisms). To be eligible for adoption, any such proposal would, at minimum, need to be consistent with the requirements of appropriate Commission confirmation of cost-based rates, and proper availability for purchase and use by MCI.

Finally, the Staff recommends that if the Commission adopts SBC's basic proposal concerning a rider to the ICA, the Commission also should require (as a matter of administrative common sense) inclusion of language addressing SBC's probable federal obligations concerning the above-named elements during the FCC's second six-month "transitional period". The FCC's Interim Order clearly states that Commission's intent concerning these elements during this second six-month period. Inclusion at this juncture of language reflecting this intent would obviate the need for another change of law proceeding in the event the FCC's stated expectations are realized. Moreover, it is a simple matter to also include language in the Rider providing that such provisions are null and void if the FCC takes actions other than those it currently intends.

52. SBC UNE Issue 5

Statement of Issue: Should SBC Illinois be required to provide new and/or existing combinations of Declassified Network Elements as TELRIC-priced offerings?

The Staff recommends that the Commission reject SBC's proposed language on this issue. The requirements of the FCC's Interim Order render incorrect SBC Illinois' position that it is no longer legally required to provide any such combinations. Staff witness Jeffrey Hoagg testified that the constituent elements of mass-market switching, enterprise market loops and dedicated transport (at least at non-OCN capacity levels) must be provided at TELRIC rates through the FCC's six-month "Interim Period". SBC's proposed language concerning SBC UNE Issue 5 therefore must be rejected, and replaced with language that, at minimum, properly reflects these obligations. Staff IB, at 63; Staff Ex. 1.0 (Hoagg), at 36.

Notwithstanding any "Section 251 declassification" of any constituent element(s) of an element combination, SBC remains obligated to provide such combinations pursuant to the terms of PUA Section 13-801. However, where at least one of the constituent elements of a combination has been "Section 251 declassified" (and therefore no longer need be provided at TELRIC rates), such combination no longer should be priced at TELRIC rates. Rather, pursuant to PUA Section 13-801(g) such combination should be priced at cost-based (but non-TELRIC) rates. Staff IB, at 63-64; Staff Ex. 1.0 (Hoagg), at 36-37.

53. xDSL Issue 8

Statement of Issue: What terms and conditions should apply to YZP trouble tickets?

In xDSL Issue 8, SBC Illinois proposes to include language into the interconnection agreement that would specify situations in which MCI would have to compensate SBC Illinois for expenses incurred due to MCI's non-performance. Staff IB, at 64; Staff Ex. 5.0 at 8-9. YZP is an alternative ordering process for CLECs ordering xDSL loops. *Id.* at 9. Under the normal xDSL ordering process, CLECs request available conditioning, such as removal of excessive bridge taps or load coils, via a local service request. *Id.* This conditioning may be requested during the initial provisioning process or after the xDSL loop has been installed. *Id.* Under the YZP ordering process, CLECs order an xDSL loop in its current form, and after the loop has been provisioned request any desired loop conditioning. *Id.*

MCI believes the same terms and conditions as applied for general trouble ticket dispatch should apply to YZP trouble ticket dispatch. Staff Ex. 5.0 at 9.

These general requirements are set forth in the UNE Appendix of the agreement and require each party to bear the cost of its erroneous dispatches. Staff IB, at 64.

SBC Illinois outlines four situations in which SBC Illinois incurs unnecessary expenses due to non-performance by MCI. Staff Ex. 5.0 at 10. SBC Illinois' four situations are included below in its proposed language for Sections 3.3.3.1 through 3.3.3.4. *Id.*; see, *also, e.g.*, Master List of Issues, Illinois MCIIm Negotiations, xDSL- Decision Point List (DPL), 7/16/04, pp. 20-21. In each of these four examples, MCI requests that SBC Illinois perform work, and that work proves to be either not needed or cannot be accomplished, due to non-performance by MCI. Staff IB, at 65; Staff Ex. 5.0 at 10.

One purpose of an interconnection agreement is to provide as much specificity in the relationship between the ILEC and the CLEC as each party deems necessary. Staff Ex. 5.0 at 11. By including this language in the interconnection agreement, both parties will better understand their rights and responsibilities in this relationship. *Id.* It is reasonable to believe that this level of specificity will also have the benefit of reducing misunderstandings between the two parties. Staff IB, at 65.

Staff recommends that the interconnection agreement include the YZP trouble ticket language proposed by SBC Illinois in Sections 3.3.3.1 through 3.3.3.4, with the following caveat. Staff Ex. 5.0 at 11. In the Staff's view, the philosophy of "cost causer pays" should extend to both parties. *Id.* Consequently, to the extent MCI is unable to resolve a YZP trouble ticket due to the non-performance of SBC Illinois, MCI should also receive compensation for expenses incurred from SBC Illinois. Staff IB, at 65.

III. CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

Matthew L. Harvey
Michael J. Lannon
Sean R. Brady
Eric M. Madiar
Brady D.B. Brown
Stefanie R. Glover

Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
312 / 793-2877

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Counsel for the Staff of the
Illinois Commerce Commission