

**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

**COMMISSION CONCLUSIONS OF 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, provides the following Staff Commission Conclusions 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 Interim Order

The Commission orders, as the Staff recommends we do under the FCC's recent Interim Order,¹ the parties to comply with the same rates, terms and conditions that applied under their interconnection agreements or tariffs regarding any disputes over the rates, terms, and conditions for unbundled access to switching, enterprise market loops, and dedicated transport are resolved by simply ordering. See Interim Order, ¶ 1, n. 5, as of June 15, 2004. Staff IB at 7.

We further find, as the Staff recommends, 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 Interim Order, ¶1, n.3. We note 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. In this regard, we find that the FCC has specified that each of these elements must be made available when unbundled local switching is made available.

¹ 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) ("Interim Order")

Since, in our 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

We also note 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. We note, however, that there was no similar freeze with respect to Section 251 unbundled enterprise local switching. However, this is because enterprise switching is no longer on the FCC's list of Section 251 UNEs. *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, we find, as the Staff recommends, 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. See Staff IB at 8-9

Furthermore, we note 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 in connection with its provision of unbundled enterprise local switching. See 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. Nor, has either party offered a position or support that would further explain how differences in state and federal law would impact differences in provisioning.

We conclude, therefore, and 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. Insofar as they are used in conjunction with Section 251 unbundled mass market local switching, we 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. Insofar as they are used in conjunction with Section 251 unbundled enterprise local switching, we do *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.

Consequently, with respect to each of these issues, we direct the parties to incorporate the terms and conditions of their ICA as it existed on June 15, 2004, as the Commission ordered decision. At such time as the law regarding any one of these issues might change, either party may invoke the ICA's change of law agreement and require negotiations on that point.

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

We reject SBC's position 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. See SBC IB at 2 (emphasis in original). SBC's position appears to stem from its erroneous belief that its obligation to provide elements resides solely in federal law. See SBC IB at 6-10. The conclusions, however, SBC draws from *USTA II*² and the *Interim Order* are untenable. The DC Circuit Court's decision in *USTA II* and the FCC's *Interim 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 *Interim Order* addressed an ILECs' state law obligations to provide certain network elements. We note that SBC's argument here appears to be the essentially the same as its preemption argument, which we address below.

SBC also asserts that the *Interim 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. We agree with SBC that the *Interim 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 *Interim 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

² U.S. Telecom Ass'n v. FCC, 359 F.3d 554; 2004 U.S. App. Lexis 3960 (D.C. Cir. 2004) ("USTA II")

and conditions under which SBC will make available dedicated transport, enterprise loops and mass market switching during the roughly 6 month interim period.

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.” Interim 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. Interim Order, ¶ 18 (internal citations omitted).

We agree with the Staff’s conclusion that 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. We thus reject SBC’s argument that federal law precludes contract language regarding the “frozen” network elements to be included in the instant ICA.

At the same time, the Commission adopts 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 *Interim Order* during the interim period. Staff RB, at 7. This proposal is fundamentally sound. We note, however, that SBC’s proposed language in the Rider appears to characterize the provisions of the Rider as fully articulating SBC’s obligations under federal law. SBC’s proposed Rider, however, fails to reference SBC’s obligations under Section 271 of TA 96. We accordingly order the parties to draft language reflecting SBC’s obligations to provide certain network elements under Section 271 of TA 96. We also note that SBC’s obligations under state law concerning these elements, specifically PUA Section 13-801 obligations – shall be set forth not in the proposed rider but rather in the ICA itself. Finally, as Staff recommends, essentially as a practical matter of administrative convenience, we order that the Rider shall 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.

C. 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. The Commission 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 we have recently re-opened our *Section*

13-801 Implementation Order to specifically reconsider our prior decisions in light of the recent changes in the federal law. Ironically, however, SBC itself attempts to re-litigate 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. We reject such collateral attacks on many of the conclusions we reached in our *Section 13-801 Implementation Order*. Clearly, this is not an appropriate proceeding for SBC to attack the Commission's conclusions 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 merely amount to another variant of its preemption argument.

Although SBC is free to make any federal preemption argument it cares to make regarding all or part of Section 13-801, it is unavailing to SBC 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, as the Staff points out, 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 arbitration proceeding. 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 were to determine 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 this Commission in Section 13-801, we find that we *must*.³

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 sum, we again find that SBC's preemption arguments lack merit and cannot, in any case, properly be advanced in this proceeding.

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.

D. Future Declassifications

SBC contends that Staff's recommendation that the ICA include clarifying language regarding future "declassifications" is "entirely unnecessary". SBC IB at 13. , The Commission, however, finds that SBC's position 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.

Accordingly, we adopt the Staff recommendation, and order the parties to incorporate language regarding the declassifications of the elements addressed in the FCC Interim Order in the ICA. SBC's continuing obligations concerning these elements under Section 271 and Section 13-801 of the PUA shall 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 as the FCC intended. Interim 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.").

E. 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 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.

Moreover, we find no FCC language in the *Interim 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. Interim Order, ¶ 29. From an administrative standpoint, as the Staff recommends, 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 and we so order the parties to draft such language.

F. Section 271 Obligations

We reject SBC's position that the Commission has no jurisdiction under Section 271 to enforce any Section 271 obligations in this arbitration. SBC IB at 24- 25. In our recent *XO Arbitration Decision*, however, the Commission addressed this very issue. In that arbitration, however, the Commission found that:

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)

In our recent *XO Arbitration Decision*, moreover, we 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 our recent prior precedent in the *XO Arbitration Decision*, we adopt the Staff's recommendation (Staff RB, at 18) and, again, require that this ICA properly reflect and account for SBC's obligations under Section 271.

G. Issues Not Resolved by the FCC's Interim Order

GT&C Issue 7

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

Commission Analysis and Conclusion

SBC and MCI both put forth arguments why their competing term limits, three (3) and five (5) years respectively, should govern this ICA. MCI's position that a five-year

term will provide an incentive for the parties to make only necessary amendments can best be accomplished in a three-year term. As Staff points out, a three-year term will not only allow the parties to establish business plans that reflect current industry standards, regulations and technology, but the Commission can effect policies which reflect current market conditions as a result of those changes in a more rapid time. Staff IB at 10-11; Staff Ex. 3.0 at 6-7.

In sum, we resolve Issue GT&C 7 by ruling that, as requested by SBC and supported by Staff, we will require the MCI-SBC ICA to remain in effect for a period of three (3) years.

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?

Commission Analysis & Conclusion

Here the Commission must ultimately determine the procedure the parties must take to terminate this Agreement and renegotiate a new one. Staff's proposal addresses both MCI's desire to maintain the terms and conditions upon expiration and SBC's concern about a withdrawing party from negotiating a new successor ICA. As Staff states, and we agree, SBC's suggested solution to operate on a month-to-month basis after the Agreement expires is unreasonable. Staff IB at 11; Staff Ex. 3.0 at 10-11. Such a practice goes against the Commission's belief that the parties be enabled to adopt long-range business plans. Staff IB at 12; Staff Ex. 3.0 at 12. We therefore conclude that the ICA should continue in effect upon expiration of the Agreement. The Commission further supports Staff's proposal that a definite deadline must govern this ICA and we hold that once a party sends notice of termination, the ICA should expire after ten months unless we approve a successor Agreement. Staff IB at 11-12; Staff Ex. 3.0 at 10-13.

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?

Commission Analysis & Conclusion

Both parties to the Agreement understand and accept the role deposits play in this particular ICA, particularly based on the past history of the parties. Staff IB at 13; Staff Ex. 3.0 at 18. SBC seems to accept Staff's proposal in its Initial Brief that the terms used regarding deposit be consistent throughout the Agreement and does not oppose Staff's proposed modification to the language in Sections 9.3.3 and 9.10 – both sections should state a request a four-month payment requirement instead of one section requesting a three-month payment requirement. Staff RB at 19-20. That being said, the Commission supports Staff's proposal and suggested modifying language regarding this issue. The Commission will otherwise adopt, as supported by Staff, the language presented jointly by the parties regarding deposit triggers and the form of deposit assurances. Staff IB at 13-14; Staff Ex. 3.0 at 19

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?

Commission Conclusion & Analysis

As Staff posits, SBC's proposal as written does not afford MCI an efficient process through which to handle billing disputes. Staff IB at 14; Staff Ex. 3.0 at 22. The Commission supports SBC's rationale for a disconnection procedure as reasonable to address financial risks associated with non-payment; however, the new dispute process it proposes, is too technical, and as Staff suggests, we reject it. Id.

In addition Staff points out, and we support, that because SBC has included qualifying language which spells out when SBC will or will not institute the following clause against MCI, 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", is accepted by the Commission. Staff IB at 14; Staff Ex. 3.0 at 23.

GT & C Issue 14

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

Commission Analysis & Conclusion

First, the Commission accepts and maintains that the parties observe the necessary actions to safeguard proprietary information. Staff IB at 15; Staff Ex. 3.0 at 27. Secondly, the Commission realizes how invaluable and important the auditing process can be to the success of the parties' relationship. The Commission believes a process that is not overly cumbersome but provides each party with the security that the opposing party is complying with the other's expectations regarding billing, invoicing and other financial obligations must govern. That said, we support Staff's proposal that audits should be conducted at six-month intervals with a non-auditing period never to exceed twelve months. Staff IB at 15; Staff Ex. 3.0 at 26-27. As Staff states, bill payment and performance as well as other financial obligations between these parties is a large component of this ICA. Id. With an audit process that occurs at regular intervals in place, the parties can address promptly any errors that may arise. Staff's position not only protects the integrity of the audit process – to evaluate billing and invoicing accuracy, but it will lessen the probability of significant billing disputes between the parties down the line.

NIM Issue 5

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

Commission Analysis & Conclusion

NIM Issue 5 deals with which party's definition of Local Interconnection Trunk Group (LITG) should be included in the ICA. SBC proposes to define Local Interconnection Trunk Group as trunk groups that carry Section 251(b)(5), ISP-bound and IntraLATA toll traffic by SBC and MCI on behalf of their respective end user customers. MCI, on the other hand, proposes to define Local Interconnection Trunk Group as trunk groups that carry local, intraLATA toll, interLATA and transit traffic. DPL NIM Issue 5.

Staff maintains, and we concur, that the essential dispute under NIM Issue 5 is not a matter of definition. Rather, it is whether MCI should be permitted to carry transit traffic and carry IXC traffic over the same trunk groups as other types of traffic. The parties appear to be in agreement 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. We agree with Staff's recommendation to 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. We also find Staff's proposed definition for Local Interconnection Trunk Group to be reasonable.

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?

Commission Analysis & Conclusion

NIM Issue 19 deals with whether separate trunking should be required for IXC-carried traffic. Specifically, NIM Issue 19 deals with whether InterLATA traffic should be carried on the same trunk groups as Section 251(b)(5), ISP-bound and IntraLATA traffic carried by MCI or SBC on behalf of their respective end user customers.

SBC contends that MCI should not be permitted to carry IXC traffic (Intra/InterLATA) over the same trunk groups as Section 251(b)(5), ISP-bound and IntraLATA toll traffic, which is delivered by SBC or MCI on behalf of their respective end user customers. Its principal argument in support of its position is that "separate trunking is needed for the accurate tracking and billing of traffic exchanged between carriers" and for ensuring that "the terminating party receives appropriate compensation." And accurate tracking and billing is especially needed in view of "recent system gaming to avoid appropriate access charge by the improper routing of IXC-carried InterLATA and IntraLATA traffic over local interconnection trunk groups." SBC Ex. 2.0 (Albright), at 17; DPL NIM 5 & 9a.

We agree with SBC that accurate tracking and billing of traffic exchanged between parties is important to ensure the terminating party receiving appropriate compensation for terminating traffic. This is because different traffic types are subject to different intercarrier compensation regimes (and thus rates) under current rules and regulation. For this reason, we ruled in our AT&T Arbitration Decision that AT&T must use separate trunks or trunk groups to carry IXC traffic. ICC Docket No. 03-0239, Arbitration Decision, at 151-154.

Staff maintains, and we agree, that MCI has not presented any convincing or persuasive arguments to show that the Commission should alter its decision on separate trunking reached in the AT&T Arbitration Decision. Staff Ex. 2.0 (Liu), at 47-49. MCI has failed to substantiate its claims of significant efficiency gains from combined trunking. MCI alleges that combined trunking improves efficiency in trunking utilization. MCI Ex. 6.0 (Price), at 32-33. MCI also alleges that combined trunking would reduce the number of switch ports needed based on Mr. Neinast's testimony in Texas. MCI Ex. 12.0 (Price), at 15. We fail to see how Mr. Neinast's discussion on switch ports under two-way trunking versus one-way trunking in Texas helps to substantiate MCI's claims of significant efficiency gains from combined interconnection trunking (with SBC in Illinois). MCI elects not to provide us with any assessment on the extent of efficiency gains to MCI from combined trunking, either in direct testimony or in response to Staff's criticisms.

We agree with Staff that MCI is at least in possession of information on its own traffic pattern and volume. It should be able to, at minimum, provide assessment on the extent of efficiency gains (if any) that would accrue to MCI from combined trunking as opposed to separate trunking. Staff Ex. 2.0 (Liu), at 42-43. Any concrete evidence on significant efficiency gains certainly would lend strong support to MCI's contention. MCI's inability (or unwillingness) to produce such assessment suggests that the theoretically possible significant efficiency gains from combined trunking do not exist for MCI. MCI thus cannot persuasively argue that it should be permitted combined trunking because of the ensuing efficiency gains, because it has not been able to present us any concrete evidence on such efficiency gains in this proceeding.

MCI has also failed to substantiate its claim that SBC's combined trunking proposal is inconsistent with SBC's concerns over MCI's trunk underutilization. MCI Ex. 12.0 (Price), at 18-19. We note that MCI does not refute SBC's data and contention that there is "extreme underutilization of MCI's trunk groups". SBC Ex. 2.0 (Albright) at 37. MCI fails to make any efforts to convince us that its "extreme trunk underutilization" is directly caused by separate trunking requirement, not by its inefficient network management or by other factors. In particular, MCI has not shown that it cannot further reduce its current "extreme" trunk underutilization under separate trunking or within each jurisdictional trunk group. Therefore, we conclude that MCI's "inconsistence" is unsubstantiated.

As Staff notes, there is no evidence that benefits of combined trunking, if any, outweigh the costs associated with the extra complexity in SBC's billing. Neither is there any evidence indicating the extent of the costs, conceded to exist, associated with the required modification to SBC's billing system to accommodate combined trunking. Likewise, MCI does not indicate who will bear the costs of developing the necessary procedures to address potential billing issue (or modifications to SBC's existing billing systems). Staff IB, at 17.

Further, MCI simply does not propose any workable solutions for the "extra complexity" caused by combined trunking. 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. Staff IB, at 17.

In short, there appears to be no reason for us to depart from the *AT&T Arbitration Decision*. ICC Docket No. 03-0239, Order at 154. We therefore, affirm our previous rulings on this issue and require separate tunking for IXC-carried traffic.

NIM Issue 9

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

Commission Analysis & Conclusion

NIM 9 deals with which party's definition of POI should be included in the ICA. Parties do not properly frame any issues under NIM 9 but simply present competing definitions of Points of Interconnection. We note that parties have not raised objections to Staff's proposed definition:

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.

We thus require that parties include Staff proposed definition of POI to the ICA, and clarify that each party should be responsible for the facilities on its side of the POI(s).

We note that POI under this issue refer to interconnection under Section 251(c)(2). We find it necessary to distinguish a Section 251(c)(2) interconnection from a non-Section 251(c)(2) interconnection. SBC is required, under Section 251(c)(2), to provide interconnection, but not interconnection facilities. As shown under NIM 16, certain interconnection arrangements such as Fiber Meet (design one) are certainly not Section 251(c)(2) interconnection, because they require SBC to provide interconnection facilities as well as interconnection. We note that Fiber Meet (design one) does not have a physical point of interconnection as defined above. Rather parties designate a physical point as the interconnection point. Both parties provide interconnection facilities on both sides of this designated point of interconnection. Thus, the definition of POI, as provided above, cannot apply to this type of interconnection arrangements. Therefore, we conclude that the definition of POI, as provided above, apply to Section 251(c)(2) interconnection, but it may or may not be applicable to non-Section 251(c)(2) interconnections. In other words, we do not uniformly hold that parties be responsible for facilities on their side of the point(s) of interconnection for non-Section 251(c)(2) interconnections.

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?

Commission Analysis & Conclusion

NIM Issue 14 essentially contains two sub-issues. Sub-issue 1 is whether SBC is permitted to charge MCI for delivering traffic from SBC's end user to the POI. Sub-

issue 2 is whether MCI should be allowed to dismantle any established interconnection arrangements solely under MCI's discretion.

We understand SBC's concerns regarding routing "local" traffic from its end users to the POI, which is located in different local calling area than the end users. However, we agree with Staff that currently effective federal law not only allows 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's network to the POI(s). Staff Ex. 2.0 (Liu), at 56. Therefore, on sub-issue 1, we affirm our previous rulings and require each party be responsible for transporting traffic from its end user customers to the POI. ICC Docket No. 03-0239, Arbitration Decision, at 34.

Regarding sub-issue 2, we agree with Staff that permitting MCI to decommission POIs at its own election would have a deleterious effect upon the network and should not be permitted. Staff RB, at 39. MCI's arguments in support of its position do not serve to invalidate Staff's recommendation. MCI Ex. 13.0 (Ricca), at 2-5.

MCI's Fiber Meet (design one) example, not only does not support its position, but rather highlights the necessity not to grant MCI the unilateral power to dismantle established interconnection arrangements. MCI Ex. 13.0 (Ricca), at 3-4. Fiber Meet (design one) requires SBC to provide half of the fiber pairs and a FOT. It is thus co-financed and thus co-owned by SBC and MCI. We see no reason or justification why MCI should be allowed, solely at its own discretion, to dismantle any established Fiber Meet (design one) interconnection arrangements, which are co-financed and co-owned by SBC and MCI.

MCI's "efficiency" argument also fails to invalidate Staff's recommendation. MCI contends that some of its interconnection arrangements (e.g., POI at each tandem in Chicago LATA) may not be established based on efficiency standard, but rather established to gain certain benefits from SBC. When the exchanged benefits cease, MCI should be free to dismantle, at its sole discretion, the established interconnection arrangements. MCI Ex. 13.0 Ricca at 4. In our view, while MCI's unilateral rights may or may not be reasonable in this specific circumstance, MCI's example does not serve to invalidate Staff's recommendation. Staff does not recommend that the Commission absolutely forbid MCI from dismantling established interconnection arrangements in all circumstances. Instead, Staff recommends that MCI should not be allowed to dismantle any established interconnection arrangement unless it submits to the Commission sufficient justification.

Therefore, we adopt Staff's recommendation, restricting MCI's rights to alter existing (or established) interconnection arrangements unless MCI submits sufficient justifications.

NIM Issue 16

Statement of Issue: When is mutual agreement necessary for establishing the

requested method of interconnection?

Commission Analysis & Conclusion

NIM 16 deals with whether mutual agreement is necessary for establish Fiber Meet interconnection arrangements. SBC argues that Fiber Meet (design one) should be based on mutual agreement between parties, not dictated by MCI. SBC Ex. 2.0 (Albright), at 20-21. MCI on the other hand claims that its rights under Section 251(c)(2) — to establish interconnection at any technically feasible points in SBC’s network — allow it the unilateral power over Fiber Meet (design one) interconnection arrangements. MCI Ex. 6.0 (Price), at 38-39; Ex.12.0 (Price), at 22.

We agree with Staff that MCI’s rights, granted under Section 251(c)(2), are not applicable to Fiber Meet (design one). Staff IB, at 19-20. Section 251(c)(2) requires SBC to provide interconnection, but not interconnection facilities. Fiber Meet (design one) clearly goes beyond the scope of Section 251(c)(2), because it requires SBC to provide interconnection facilities as well as interconnection.

MCI’s cited passage of the Local Competition Order (¶198) is irrelevant to Fiber Meet (design one). Paragraph 198 of the Local Competition Order addresses incumbent LECs’ interconnection obligations under Section 251(c)(2). As Fiber Meet (design one) does not fall under Section 251(c)(2), the FCC’s discussion on the incumbent LECs’ obligations under Section 251(c)(2) is not relevant to Fiber Meet (design one).

We disagree with MCI that the Triennial Review Order does not relieve SBC of its obligations to provide interconnection (or entrance) facilities on a unbundled based at TELRIC prices. MCI Ex. 12.0 (Price), at 20. We also disagree with MCI that SBC’s “unilateral ability to jettison ‘design one’” is a valid justification for rejecting SBC language. MCI Ex. 12.0 (Price), at 23. MCI is correct in that SBC’s limiting language does give SBC the veto power over Fiber Meet Point (design one), but it also affords MCI the same veto power. MCI appears to base its objection to SBC limiting language on its mistaken belief that MCI should have the unilateral power to dictate when and where SBC should build or provide interconnection facilities (at no costs to MCI). MCI Ex. 12.0 (Price), at 23. As MCI’s unilateral power under Section 251(c)(2) does not apply to Fiber Meet (design one), SBC’s veto power is not valid argument against SBC language. We also fail to see how network reliability concerns would justify MCI’s unilateral power over Fiber Meet (design one). MCI Ex. 12.0 (Price), at 23-24.

Finally, we also find that MCI’s reasoning for not including Fiber Meet (design two) in the ICA unconvincing. *Id.* We note that SBC is not required to provide interconnection facilities under Section 251 or not under Section 251. We thus fail to see how SBC’s having no obligation to provide interconnection facilities is valid ground for rejecting SBC’s Fiber Meet Point (design two). We, therefore, conclude that SBC’s proposed language is appropriate and should be included in parties’ ICA.

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?

Commission Analysis & Conclusion

We adopt SBC's proposed language for the same reasons we did above in NIM Issue 16.

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?

Commission Analysis & Conclusion

NIM Issue 15 deals with whether MCI is required to establish direct trunking to each SBC tandem in a LATA. SBC contends that MCI should be required to set up direct trunking to each SBC tandem. MCI on the other hand claims its rights to SPOI.

Staff recommends that we adopt a middle ground proposal — that is, requiring MCI to establish direct trunking to a SBC tandem if busy hour traffic reaches T-1 for three consecutive months. Staff proposed threshold of traffic is the same as the one adopted by the Commission in the Verizon Arbitration. Staff IB, at 21; ICC Docket No. 01-0007, Order at 6-8.

SBC objects to the Staff's recommendation. 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. Staff maintains, and we concur, that SBC has essentially identified a distinction without a difference. Staff RB, at 22-23. We agree with Staff that SBC's solution — simply requiring direct trunking, regardless of traffic levels — is no different from the one rejected by the Commission in the *Verizon Arbitration Decision*.

We concur with Staff that MCI appears to reject any proposal that would impose an affirmative obligation upon it, favoring an approach in which it "work[s] cooperatively with SBC to establish either direct office trunking or tandem trunking, where traffic patterns so warrant." MCI IB, at 34-35. We agree that MCI has inappropriately

interpreted Staff Witness Russ Murray's testimony. As noted by Staff, Mr. Murray in fact stated that reduction in the number of POIs per se is not a factor in tandem exhaust, provided that direct trunking is used. Staff RB, at 39-40. Direct trunking is, of course, precisely what MCI resists doing here.

MCI appears to understand that direct trunking is in fact needed "when traffic patterns ... warrant". MCI IB, at 34-35. MCI, however, recommends that the Commission adopt MCI's position, citing that "parties have not negotiated language". MCI Ex. 13.0 (Ricca), at 8. We find MCI's reasoning puzzling. Parties have brought this issue to before us for arbitration in this proceeding. They are thus deemed to have negotiated (language), but unable to reach agreement.

After considering all evidence and arguments, we conclude that Staff's recommendation is reasonable, and should thus be adopted.

NIM Issue 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?

Commission Analysis & Conclusion

NIM Issues 11 & 12 essentially deals with which party's classification of traffic should be included in the ICA. SBC argues that it is important to define each jurisdictional type of traffic: 251(b)(5), ISP-bound, IntraLATA, and InterLATA and Transit. SBC Ex. 9.0 (McPhee), at 60-61. MCI, on the other hand, appears to suggest that SBC's classification of traffic is calculated to prohibit it from carrying multi-jurisdictional traffic over the same trunk group. MCI IB, at 20; Staff RB, at 38-39.

Staff maintains, and the Commission concurs, that there is a need to classify traffic for jurisdictional purposes. The use of the FCC's decisions and traffic classifications is proper. See Staff RB, at 39-40.

As Staff notes, the FCC has abandoned its official definition of "local traffic", citing unnecessary ambiguities created by the term "local traffic". SBC's use of "251(b)(5)" is consistent with the FCC's classification of jurisdictional traffic: "251(b)(5)," "ISP-bound," "IntraLATA" and "InterLATA." See Staff IB, at 22. We, therefore, conclude that SBC's jurisdictional classification of traffic is appropriate and should be included in the ICA.

NIM Issue 17

Commission Analysis & Conclusion

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?

NIM 17 deals with whether MCI is entitled to purchase interconnection (entrance) facilities from SBC at TELRIC prices. MCI contends that it is entitled to interconnection facilities at TELRIC rates. MCI IB, at 37-38. We disagree. As Staff notes, SBC is not obligated to provide interconnection facilities (as dedicated transport UNEs) at TELRIC-based rates under Section 251(c)(3) and 252(d). Staff RB, at 41. Neither is SBC required to provide interconnection facilities under Section 251(c)(2), at TELRIC or non-TELRIC prices. Therefore, we reject MCI's proposed language.

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?

Commission Analysis & Conclusion

NIM 31 contains three separate issues: (1) should transit services be subject to this arbitration proceeding, (2) what rates, terms and conditions should govern transit services, and (3) whether transit traffic should be carried over the local interconnection trunk group. From DPL NIM 5, parties apparently have not reached agreement as whether to carry transit traffic over the Local Interconnection Trunk Group. MCI's framing of issue essentially combines the second and third disputed issues.

We agree with Staff that there are no clear or explicit guidelines in the Act or FCC rules or the Illinois Public Utilities Act governing the provision of transit services. Staff IB, at 14. We also agree with Staff that transit services are vital, especially for carriers whose traffic volume is not sufficient to justify a DS-1 trunking. Staff IB, at 14-15. We thus adopt Staff's recommendation requiring SBC to provide transit services.

SBC has presented us no supporting evidence for its proposed rates for transit traffic that exceeds 30 million MOU per month. We thus reject SBC's proposed rates for transit traffic exceeding 30 million MOU per month. We also agree that it is appropriate to apply the Commission-approved transit rates to transit traffic, regardless whether traffic volume is greater than 30 million MOU per month. Staff IB, at 24-27.

We agree with Staff that MCI's pick-and-choose approach in selecting rates for transit services is inappropriate and should be rejected. Staff IB, at 15. We find MCI's arguments in support of its pick-and-choose approach inconsistent and unpersuasive.

First, MCI appears to suggest that it is not asking the Commission to abolish jurisdictional traffic. MCI Ex. 13.0 (Ricca), at 15. MCI, however, justifies its pick-and-choose approach (in selecting rates for transit traffic) by effectively assuming away jurisdictional distinction of traffic. MCI is aware of the fact that the Commission has approved different sets of rates for reciprocal compensation traffic and transit traffic, respectively. MCI Ex 13.0 (Ricca), at 9. This suggests that MCI is aware of the fact that the Commission does not subject transit traffic to the same set of rules and regulation as it does reciprocal compensation traffic — i.e., the Commission affords transit traffic different jurisdictional treatment. MCI does not challenge the Commission's jurisdictionally distinctive treatment of transit traffic by claiming it to be in violation of any federal or state laws. However, MCI justifies its proposal to apply the Commission approved tandem switching rate for reciprocal compensation traffic to transit traffic by effectively abolishing (or assuming away) the jurisdictionally distinctive treatment of transit traffic. Specifically, MCI justifies its pick-and-choose approach by claiming that the underlying costs of switching traffic through tandem are the same for transit traffic and reciprocal compensation traffic. MCI Ex. 13.0 (Ricca), at 9.

The essence of jurisdictionally distinctive treatment of traffic is to subject jurisdictionally distinctive traffic to different sets of rules and regulations. Different types of traffic are charged different rates not because the underlying costs are different, but simply because they are subject to different sets of rules and regulation. MCI may be correct that underlying costs of tandem switching are the same for transit traffic and reciprocal compensation traffic. This, however, is not sufficient ground for setting transit tandem-switching rate equal to the tandem-switching rate for reciprocal compensation traffic, as transit traffic is not subject to the same set of rules and regulation. Unlike the tandem-switching rate for reciprocal compensation traffic, the tandem-switching rate for transit traffic is not required, under federal or state law, to be cost-based. Therefore, MCI's cost-based justification effectively abolishes jurisdictional distinction of traffic, which it claims that it is not asking the Commission to do, and thus is not appropriate.

MCI not only adopts a pick-and-choose approach in selecting rates for transit traffic, but it also adopts a pick-and-choose rule to when-and-where to apply its cost-based justification. As Staff notes, MCI selects the rates most favorable to MCI for each rate element from the Commission approved transit rates and reciprocal compensation rates. Staff Ex. 2.0 (Liu), at 80-81. The Commission-approved tandem-switching rate is lower for reciprocal compensation traffic than it is for transit traffic. MCI proposes to apply its cost-based justification to tandem switching rate, arguing that the tandem-switching rate for transit traffic should be set equal to the tandem-switching rate for reciprocal compensation traffic since the underlying costs are the same. MCI Ex. 13.0 (Ricca), at 9. For transport rate elements ("Tandem Transport" and "Tandem Transport Facility"), the Commission-approved rates for reciprocal compensation traffic are less favorable to MCI than the Commission-approved rates for transit traffic. Of course, one can reasonably argue that, similar to tandem switching, the underlying transport costs are not different for transit traffic and reciprocal compensation traffic, respectively. Based on MCI's cost-based justification for tandem switching, it would be logical for MCI to propose to apply the Commission-approved transport rates for reciprocal compensation traffic to transit traffic as well. MCI, however, does not propose to do so.

On the contrary, for transport rate elements, MCI abandons its cost-based justification and instead, proposes to conform to the Commission-approved jurisdictional distinction — applying the Commission-approved transit rates to transit traffic. Therefore, we find that MCI not only adopts a pick-and-choose approach to selecting rates, but it also applies its pick-and-choose rule to when-and-where to apply its cost-based justification.

Staff further contends, and we agree, that MCI has not any presented any coherent arguments in support of its proposed “added protection” language. Staff IB, pp. 15-16. The “added protection” language is contained in Section 3.7 of MCI Transit Appendix, which states,

In the event MCI originates traffic that transits SBC’s network to reach a third party terminating carrier with whom MCI does not have a traffic compensation plan, then MCI will indemnify, defend and hold harmless SBC against any and all losses including, without limitation, charges levied by such third party terminating carrier ***only if the transit party has supplied the call detail and volume support described in the Appendix Reciprocal Compensation.*** MCI Transit Service Appendix, Section 3.7.

Staff argues that MCI presents no explanation on why SBC is to pay reciprocal compensation as a transit provider. Staff IB, at 15-16. MCI attributes this criticism to Staff’s failure to read MCI’s testimony under RECIP COMP18. MCI Ex. 13.0 (Ricca), at 10. We find MCI’s responses to Staff’s criticism puzzling and leave many unanswered questions.

First, MCI does not explain why and how its discussion under Recip Comp 18 is relevant to SBC’s obligation as transit provider. Under Recip Comp 18, MCI describes intercarrier billing between MCI and a UNE-P service provider — a carrier that provides services over UNE-P. Specifically, it concerns traffic originated from a UNE-P provider and terminated to MCI. In this case, MCI is to collect reciprocal compensation from this terminating UNE-P provider. MCI, however, does not explain why this example is relevant to MCI proposed limiting language on SBC as a transit provider. Specifically, why is SBC the transit provider between MCI and a UNE-P provider? Or alternatively at what points does SBC begin and stop to render MCI transit services (tandem switching, tandem transport, or tandem transport facility) for which MCI compensates SBC at transit rates, respectively? On appearance, there does not appear to be any transit services rendered by SBC for traffic between MCI and a UNE-P service provider. MCI’s assertion of SBC being the transit provider between MCI and a UNE-P provider may or may not be correct. MCI bears the responsibility to demonstrate to us the relevance of its discussion under Recip Comp 18 to its “added protection” language.

Second, we note that MCI’s “added protection” language is added to a section that does not mention the phrase “UNE-P” and even less confine the third party carrier to UNE-P provider. While using its discussion under Recip Comp 18 as justification for its “added protection” language, MCI does not state whether its “added protection” language is only intended for transit traffic originating from a UNE-P third party provider.

Third, it is inappropriate for MCI to add its “added protection” language to Section 3.7, regardless whether its “added protection” language per se is reasonable or not. Based on our reading, Section 3.7 addresses traffic originated from MCI and terminated to a third party carrier, with SBC as the transit provider. As the originating carrier, MCI possesses the Calling Party Number (CPN) information, and should bear the responsibility to pass the CPN information to the third party terminating carrier, either directly or indirectly through SBC, the transit carrier. We are puzzled as to why or on what ground MCI may hold SBC, the transit provider, responsible for providing CPN information on behalf of MCI, the originating carrier.

Fourth, we are puzzled by the relevance of MCI’s discussion on UNE-P under Recip Comp 18 to its “added protection” language in Section 3.7. MCI’s discussion under Recip Comp 18 concerns traffic originating from a third party UNE-P provider and terminating to MCI, in which case MCI is to collect intercarrier compensation payment from this third party UNE-P provider. Section 3.7, however, deals with traffic in the opposite direction – traffic originating from MCI and terminating to a third party terminating carrier (with SBC the transit provider). In this case, MCI is not to collect intercarrier compensation payment from the third party terminating carrier. Thus we fail to see how MCI’s discussion on UNE-P under Recip Comp 18 can be used to support its “added protection” language in Section 3.7.

Fifth, we fail to see why MCI’s decision not to establish intercarrier payment (with a third party carrier) entitles it to impose the “added protection” language on the transit provider (SBC). In our view, MCI is responsible for setting up an intercarrier payment plan with a third party carrier. We agree that whether to establish intercarrier payment plan (with a third party carrier) or not is MCI’s, not SBC’s, decision to make. MCI Ex. 13.0 (Ricca), at 11. However, we find it unreasonable and inappropriate for MCI to impose additional restrictions and responsibility on SBC in the event that it elects not to establish intercarrier payment plan (with a third party carrier). We, therefore, conclude that MCI’s decision not to establish intercarrier payment plan should not and cannot be used as ground for imposing “added protection” language.

Sixth, we disagree with MCI that Staff’s modifications of SBC language are insufficient. MCI Ex. 13.0 (Ricca), at 11. MCI contends that additional changes to SBC’s proposed language are necessary because SBC proposed language requires that MCI establish intercarrier payment plan with the third party carrier before SBC provides transit services. MCI Ex. 13.0 (Ricca), at 11. MCI does not point to the specific section in which SBC imposes such as requirement on MCI. Based on our reading of SBC proposed language, no such restriction is imposed.

We are very much troubled by MCI’s contention that nowhere in the country “does a carrier have the right to be held harmless and indemnified by MCI for transit traffic that is delivered to a third party carrier when there is no CPN attached to that traffic.” MCI Ex. 13.0 (Ricca), at 13. In our view, it is the responsibility of MCI (the originating carrier), not SBC (the transit provider), to supply the third party terminating carrier (to whom traffic is delivered) with CPN information. MCI has not valid ground,

under federal or state law, for holding SBC responsible for providing CPN information on behalf of MCI, the originating carrier.

We conclude that MCI's arguments in support of its "added protection" language are incoherent and unpersuasive, and MCI's "added protection" language is thus rejected. We find MCI's criticisms of Staff's recommended modifications of SBC language unconvincing, and we adopt Staff's recommended modifications to SBC's proposed language in the Transit Traffic Appendix.

Finally, we are puzzled by MCI's assertion that "there was never any discussion of separate trunk groups for transit traffic" between parties. MCI Ex. 13.0 (Ricca), at 12. Issues related to separate trunking for transit traffic are embedded in NIM5, under which SBC proposes transit traffic not being carried over the local interconnection trunk group, while MCI proposes transit traffic being carried over the local interconnection trunk group. That is, NIM 5 clearly indicates that separate trunking for transit traffic is a disputed issue and rendered for arbitration. In addition MCI also phrases its issue under NIM 31 as if transit traffic is (or should be) carried over the local interconnection trunk group. Therefore, MCI has brought to us the issues of separate trunking through NIM 31 and NIM 5. We note that issues related to jurisdictional trunking for transit traffic are similar to issues related to jurisdictional trunking for IXC traffic (NIM19). We see no reason why we should reach different conclusions on transit traffic and IXC traffic. Therefore, our ruling on separate trunking for IXC traffic applies to transit traffic as well.

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?

Commission Analysis & Conclusion

Issue NIM 17 is similar to NIM 24. Issue 24 deals with whether MCI may purchase (from SBC) facilities used to connecting MCI's network to SBC's 911 Selective Router at TELRIC prices. SBC contends, and Staff concurs, that SBC has no obligation to provide MCI 911 interconnection facilities at TELRIC prices under Section 251(c)(2) or Section 251(c)(3). Staff RB, at 43-44.

MCI, on the other hand, argues that trunk groups connecting MCI's network to SBC's 911 Selective Router — a switch like-device that routes 911 calls to the proper public safety answering point (PSAP) — should be leased to MCI at TELRIC prices. MCI IB, p.42.

We agree with Staff that facilities used to connect MCI's network to SBC's 911 Selective Router are entrance (or interconnection) facilities. We also agree with Staff

that, pursuant TRO and USTA II, SBC is no longer required to provide entrance facilities to MCI at TELRIC or non-TELRIC prices. Staff Ex. 2.0, pp.88-89.

We also agree that interconnection is different from interconnection facilities. Staff Ex. 2.0, fn.151 & at 88. SBC is obligated, under Section 251(c)(2), to provide interconnection at TELRIC prices. But it not obligated, under Section 251(c)(2), to provide not interconnection (or entrance) facilities at TELRIC or non-TELRIC prices. We disagree with MCI that SBC must lease interconnection (or entrance) facilities to MCI at TELRIC prices because SBC is obligated, under Section 251(c)(2), to provide interconnection at TEL RIC prices, the pricing standard that the FCC established in accordance with Section 252(d). MCI Ex. 12.0 (Price), at 31-32.

Similar to NIM 17, we conclude that MCI's arguments are based on its misreading of Section 251(c)(2) of the Act. We therefore reject MCI's proposed language.

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?

Commission Analysis & Conclusion

The essential disputed issue between parties under NIM 22 is whether MCI is responsible for transporting FX traffic from FX traffic from the geographic area assigned to such NPA-NXX to MCI's FX services subscribers. SBC takes the position that MCI should be responsible for transport FX traffic from the geographic area assigned to such NPA-NXX to MCI's FX service subscriber. MCI on the other hand opposes SBC's language.

MCI appears to argue that it should not be responsible for transporting FX traffic from the "homing" geographic area to its FX services subscribes because "[n]either SBC's revenues nor its costs change one iota if MCI's customers are actually located in the exchange in which an NPA-NXX is rated or not." MCI IB, p.42. We disagree. Obviously, SBC's revenue would be different if MCI's customer is located in the same exchange, because traffic will then be subject to reciprocal compensation, not the intercarrier compensation regime for FX traffic.

Staff contends that FX traffic cannot be simply classified as local or toll traffic. FX traffic bears the characteristics of both toll and local traffic. It originates from and terminates to different local calling areas. It is local only from caller's perspective, not

from any other standpoints. FX traffic also differs from the standard calling-party-pay services in that FX service providers traditionally collect payments from the calling party at the price of local call and from the FX services subscribers for toll traffic transport. Staff Ex. 2.0 (Liu), at 90-93. This is consistent with our views of FX traffic expressed in the Level 3 Arbitration Decision (ICC Docket No. 00-0332, Arbitration Decision, at 8-10).

We disagree with MCI that we have in the past ruled that FX traffic is local traffic. MCI Ex. 13.0 (Ricca), p.15. We have, on several occasions, recognized that FX traffic is a special type of traffic, and thus afforded it special treatment. Staff RB, p.42-43. In particular, we did not, in the AT&T Arbitration, treat FX traffic as local traffic, which is subject to reciprocal compensation, or toll traffic, which is subject to access charge. Rather we subjected FX traffic to bill-and-keep regime. ICC Docket No. 03-0239 at 120 & 123-4. MCI's contention clearly is inconsistent with our treatment of FX traffic in the AT&T Arbitration, from which MCI appears to draw support. MCI Ex. 13.0 (Ricca), at 15.

Moreover, we have concluded in the AT&T Arbitration Decision that each party is responsible for transporting traffic from its end user customers to the POI(s). (ICC Docket No. 03-0239 at 34.) We, therefore, reject SBC's proposed language holding MCI responsible for transporting FX traffic from the "homing" geographic area to MCI's FX services subscribers.

NIM Issue 28

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

Commission Conclusion

The issue presented in NIM 28 is determining which proposed trunk blocking calculation methodology should be utilized. 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*.

The Commission understands MCI witness Mr. Price's general concern that there may be potential differences between the forecasting needs of an ILEC and a CLEC. However, the Commission 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. Mr. Albright reported the average trunk utilization for MCI, and the numbers were not troubling, revealing a significant number of underutilized trunk groups. Based upon these figures, the Commission 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.

Additionally, investigation of trunk blockage that SBC Illinois reported on the CLEC Online performance measurement site revealed no problems. 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.⁴ In the aggregate – to all CLECs – SBC Illinois reported no failure, or near failure, relative to the trunk blockage parity measure of PM 70.

The Commission agrees with Staff and finds that SBC Illinois should not be directed to modify its trunk forecasting methodology. Until there is a demonstrated pattern of trunk blockage from SBC Illinois to the CLEC community due to forecasting errors, there appears to be no need to make the change MCI requests.

NIM Issue 30

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

Commission Conclusion

The fact that SBC witness Albright states that SBC works toward a 20-business day guideline to provision the trunks shows that it attempts to complete the work well within MCI's proposed "absolute" timeline of 30 days. SBC Ex. 2.0, at 19. However, as SBC states, and Staff echoes, subjecting SBC to a definite "in any event" 30-day window does not allot for circumstances known and unknown to occur in this process. SBC Ex. 2.0, Albright at 19. Because circumstances outside of SBC's control are more than a speculative happening, the Commission finds that SBC's language is more reasonable. As Staff points out, SBC has notification requirements in Section 19.4 which give MCI additional assurances that SBC will not be able to adjust the provisioning due dates without MCI's knowledge and ability to make its own adjustments. Staff IB, at 32 *citing* Staff Ex. 7.0 at 4-5. The Commission 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. See Staff IB, at 32 *citing* Staff Ex. 7.0 at 4-5. We, accordingly, adopt SBC's proposed language be adopted.

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?

Commission Conclusion

⁴ The only months reported for PM 70 were from January 2004 through June 2004.

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. The Commission, however, 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), we adopt the Staff's final revised recommendation concerning Issue NGDLC1.

Accordingly, we reject MCI's proposed language for NGDLC1. In its place, we 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.

LNP Issue 3 & Pricing 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)

Commission Conclusion

LNP Issue 3 deals with what terms and conditions should govern Coordinated Cutovers (CHC). When an end user switches from SBC to MCI and retains its existing phone number, both SBC and MCI need to make changes to physically perform the transfer of services from SBC switching facilities to MCI switching facilities. MCI may request a CHC cutover or a non-CHC cutover. In a CHC cutover request, SBC coordinates with the CLEC and does not remove the switch translation instructions from the SBC donor switch until SBC receives instructions from the CLEC to do so. In short, under a CHC cutover, SBC takes extra time and efforts to ensure no (or minimal) service interruption to the end user.

SBC takes the position that it should be compensated for the extra time and efforts associated with performing CHC cutovers. SBC also proposes that it be compensated for performing CHC cutovers pursuant to the SBC's FCC Access Tariff No. 2. SBC Ex. 3.0 (Chapman), at 106-107.

MCI contends that SBC's proposed contract language "improperly limits its obligation to provide MCI with non-discriminatory services and permits SBC unilaterally to change mutually agreed upon scheduling" for CHC cutovers. Staff agrees with MCI to the extent that the proposed contract language should allow MCI to suspend mutually agreed scheduling for a CHC cutover as well. Staff contends, and we concur, that, while it is not unreasonable to allow SBC to suspend a mutually-agreed upon scheduling of a CHC cutover, MCI should be afforded the same protection in the CHC

Appendix. Staff Ex. 2.0 (Liu), at 7; Staff IB, at 34. SBC does not object to Staff's proposal for additional language. SBC Ex. 2.1 (Chapman), at 2. We therefore adopt Staff's proposal for additional language to allow MCI to suspend mutually agreed scheduling for CHC cutovers.

MCI also contends that SBC proposed CHC Appendix adds nothing to the parties' agreement and may be inappropriately used as justifications for billing additional and unwarranted amounts to MCI." MCI Ex. 5.0 (Litchtenberg), at 16. We disagree. As Staff points out, CHC Appendix provides that SBC shall be compensated for the extra time and efforts associated with performing CHC cutovers pursuant to SBC's FCC Access Tariff No. 2, which is consistent with our rulings on the same issue in AT&T Arbitration. Staff Ex. 2.0 (Liu), at 7-8; Staff IB, at 34-35.

Pricing Schedule Issues 10 & 25 deal with the rates at which SBC shall be compensated for performing CHC cutovers. MCI argues that the appropriate rates for CHC cutovers should be the Commission-ordered TELRIC based rates. It proposes, in direct testimony, twelve rates for CHC cutovers, which are the "comparable rates that MCI proposed in Docket No. 03-0593" (TRO Batch Cut proceeding). MCI Ex. 6.0 (Price), at 62-63. MCI, in rebuttal testimony, concedes that all (but one) proposed rates are indeed for batch cut processes, not appropriate for non-batch CHC cutovers. MCI proposes to delete all rate elements but one — "Enhanced Daily Process – CHC Basic Option". MCI's proposed rate for this rate element remains the same as in direct testimony. MCI Ex. 12.0 (Price), at 29; MCI Errata Sheet.

There are several unanswered questions regarding MCI's modified proposal for (non-batch) CHC cutovers. First, MCI provides no supporting evidence that the rate it proposes in direct testimony for "Enhanced Daily Process – CHC Basic Option" is indeed for non-batch hot-cut. Neither has it provided any supporting evidence regarding the appropriateness of its rate for "Enhanced Daily Process – CHC Basic Option", except that the proposed rate is the comparable rate that MCI proposed in ICC Docket 03-0593 (batch cut proceeding).

Second, MCI argues that the appropriate rates for non-batch hot-cuts should be Commission ordered rates. But it does not demonstrate how its proposed rate for "Enhanced Daily Process – CHC Basic Option" is or would be equivalent to Commission-ordered rate(s).

Third, MCI proposes different rates for twelve hot-cut rate elements in direct testimony. For example, the proposed rate is \$0.45 and \$0.64 for "Bulk Project Offering – FDT Option – Basic" and "Enhanced Daily Process – CHC Basic Option", respectively. MCI Ex. 6.0 (Price), at 63. Presumably, MCI had justifications for proposing rates for twelve different rate elements in direct testimony. MCI issued an Errata eliminating 11 of those rate elements with no explanation. MCI failed to explain why different rate elements were eliminated without a trace from direct to rebuttal testimony to its issuance of its Errata. In other words, MCI does not explain why it is no

longer necessary to have twelve different rate elements or having different rates for twelve different rate elements.

Finally and most importantly, we have addressed this issue and adopted SBC's position in the AT&T/SBC Arbitration. ICC Docket No. 03-0239, Arbitration Decision, at 107. In the AT&T/SBC Arbitration, SBC took essentially the same positions as it does in this proceeding regarding whether and how SBC be compensated for performing CHC cutovers. MCI does not explain why we should depart from our rulings on (non-batch) hot-cut issues reached in the AT&T/SBC Arbitration Decision. We, therefore, affirm our previous rulings and conclude that SBC shall be compensated for performing CHC cutovers pursuant to SBC's FCC Access Tariff No.2.

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?

Commission Analysis and Conclusion

The Commission orders that the rates based on our recent UNE Loop Order, which will be contained in a forthcoming SBC tariff, shall be used in this ICA. Staff IB, at 35. As the Staff recommended, 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. Further, we direct the parties to replace the proposed language found in the disputed footnote 7 with the Staff's recommended language, which reads 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." See Staff Ex. 4.0 at 4.

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?

Commission Analysis and Conclusion

This issue is similar to Price Schedule Issue 3 immediately above. Just as above, we order 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, shall be used in this ICA. The rates in the ICA can then be modified, if needed, once the applicable SBC tariffs are modified. See Staff IB, at 35-36; Staff Ex. 4.0 (Hanson), at 5. We further direct, as we did above, the parties to replace the proposed language found in the disputed footnote 7 with the Staff's recommended language, which reads 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." See Staff Ex. 4.0 at 4.

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?

Commission Analysis and Conclusion

We find that both parties have taken rather extreme positions on this issue. 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." See MCI Ex. 12.0 (Price Supplemental Revised), at 28; SBC Illinois Ex. 14.0 (Silver), at 40.

The Commission, however, agrees with SBC witness Mr. Silver that SBC is no longer obligated to provision feeder subloops as a UNE. As Staff witness 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 Commission adopts MCI's proposed interim rates.

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?

Commission Conclusion

Recip Comp 1 deals with two issues: what classification of traffic should be included in the Recip Comp Appendix, and whether intercarrier compensation traffic should be determined by the physical locations of end-user customers.

We agree with Staff that SBC's classification of traffic tracks the FCC's traffic classification and is thus appropriate. ([Staff RB, p.23-24](#); [Staff Ex. 2.0, p.95-97](#)).

We also agree with Staff that reciprocal compensation traffic is determined based on whether traffic physically originates and terminates in the same local calling area. ([Staff Ex. 2.0, p.95](#)).

Contrary to MCI's contention, traffic "originating and terminating in the same local calling area" is traffic originating and terminating physically in the same local calling area. ([MCI Ex. 13.0, pp. 18-19](#)). "Local calling area" is defined as a geographic area, not defined in a virtual space or defined based on NPA/NXX. In our opinion, it is only logical to interpret traffic "originating and terminating in the same local calling area" to mean traffic originating and terminating physically in the same local calling area.

MCI, in support of its use of NPA-NXX to define "local traffic", contends that its definition is consistent with the Commission's ruling that FX traffic is local. ([MCI Ex. 13.0 Ricca at 19](#)). We disagree. As noted under NIM22, we recognized FX traffic as a special type of traffic. We did not afford FX traffic the same treatment as we did local traffic for the purpose of intercarrier Compensation. In particular, we did not subject FX traffic to reciprocal compensation. MCI's contention that we have ruled FX traffic as local is directly contradicted by our treatment of FX traffic. ([Docket No. 03-0239 Order at 123-124](#)).

MCI further contends that it is not attempting to collect reciprocal compensation for ISP bound traffic by defining traffic based on NPA/NXX. ([MCI Ex. 13.0 Ricca at 20](#)). We find that MCI's contention is inconsistent with its proposed language. The motivation behind MCI's definition of local traffic may or may not be to collect reciprocal compensation for ISP bound traffic. MCI proposed language and definition would entitle MCI to collect reciprocal compensation for ISP bound traffic. Unlike SBC's proposal, MCI does carve ISP-bound traffic out of any of its traffic classifications. In particular, MCI's proposed language and definition do not distinguish traffic subject to Section 251(b)(5) from ISP-bound traffic. ([Staff Ex. 2.0 at 97](#)).

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?

Commission Conclusion

Recip Comp 4 deals with what is the appropriate intercarrier compensation for FX traffic. SBC takes the position that FX traffic should be subject to bill-and-keep, not subject to reciprocal compensation as local traffic is. MCI on the other hand contends that FX traffic should be treated as local traffic, subject to reciprocal compensation.

As noted under NIM 22, we agree with Staff that FX traffic cannot be simply classified as local or toll traffic. Clearly, FX traffic bears the characteristics of both local and toll traffic. FX traffic physically originates and terminates in different local calling areas. It is local only from callers' perspective, and not from any other standpoints.

We have afforded FX traffic special treatment, subjecting to neither reciprocal compensation nor access charge. Rather, we have subjected FX traffic to bill-and-keep intercarrier compensation regime. We see no reasons for us to depart from our previous rulings. ([ICC Docket No. 03-0239 Order at 120 & 123-4](#)) We conclude that FX traffic (ISP-bound or non-ISP-bound) should continue to be subject to bill-and-keep regime.

Regarding segregating FX traffic, we have the same concerns as we did in the AT&T Arbitration Decision. We require parties to adopt the same tracking method as adopted in AT&T Arbitration Decision. ([ICC Docket No. 03-0239, Order at 129-130; Staff Ex. 2.0, p.100](#)). More specifically, we require 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.

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?

Commission Conclusion

Recip Comp 5 essentially deals with whether "ISP-bound traffic", as the FCC used the term in the ISP Remand Order, refers to traffic from callers to ISPs physically located in the same local calling area.

SBC contends, and MCI disagrees, that "ISP-bound traffic" in ISP Remand Order refers to traffic from callers to ISPs physically located in the same local calling area.

We agree with Staff that SBC's interpretation of "ISP-bound traffic" is precisely what the FCC found in its ISP Remand Order, and is thus appropriate. ([Staff Ex. 2.0, p.104](#); [Staff RB, p.46](#)).

As Staff notes, non-FX ISP-bound traffic is typically, if not exclusively, traffic from end users to ISP providers physically located in the same local calling area, which is, under SBC's proposal, subject to the FCC's interim intercarrier compensation plan (as provided in ISP Remand Order). Thus, the dispute in interpreting FCC's ISP Remand Order has little practical importance given our rulings (under Recip Comp 4) on issues related to intercarrier compensations for FX (ISP-bound or non-ISP-bound) traffic.

RESALE Issue 1

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

Commission Conclusion

Resale 1 deals with whether MCI may resell services purchased pursuant to the Resale Appendix in the instant ICA to another telecommunications carrier. Two sub-issues emerge. The first sub-issue (sub-issue 1) deals with the terms and conditions under which MCI should be allowed to resell services, which it obtains from SBC at wholesale discount, to carriers for use by those carriers as end users of the services. The second issue (sub-issue 2) deals with whether or not MCI should be allowed to resell services, obtained from SBC at wholesale discount, to third carriers for the provision of telecommunications services by those carriers.

On sub-issue 1, SBC takes the position that MCI may resell services, obtained from SBC at wholesale discount, to carriers for use by those carriers as end users of the services. But MCI must resell SBC services to these carrier end users at the same rates, terms and conditions as it resells to non-carrier end users (i.e., end users who are not telecommunications carriers). MCI does not address this sub-issue in testimony or brief.

Staff argues, and we concur, that a carrier, when purchasing services for use as end user of the services, is simply an end user of the services, and is not situated differently than non-carrier end users. 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. Therefore, SBC's non-discriminatory restriction is not unreasonable and should be included in parties' ICA. See Staff IB, at 40. We agree with Staff's assessment and we thus require that MCI resells to carrier end users at the same rates, terms and conditions as it resells to non-carrier end users.

On sub-issue 2, SBC takes the position that MCI should not be permitted to resell services, which it obtains from SBC at wholesale discount, to carriers for the provision of telecommunications by those carriers. MCI, on the other hands, contends that it should be allowed to resell, to other telecommunication carriers, services purchased under the Resale Appendix, regardless whether for their own use as end users of the services or for the provision of telecommunications services by those carriers. MCI's language, in particular, does not prohibit MCI from reselling services, purchased pursuant to the Resale Appendix, to a third-party carrier for the third-party carrier to provision telecommunication services to customers. DPL Resale Issue 1; Resale Appendix; MCI Ex. 6.0 (Price), at 103-107.

In support their respective positions, SBC advances legal arguments as well as practical concerns, while MCI argues that the 1996 Telecommunications Act prohibits SBC proposed restrictions. Staff contends, and we agree, that none of parties' arguments based on Section 251 of the Act (or the Local Competition Order) are persuasive. Staff Ex. 2.0 (Liu), at 11-23.

SBC contends that Section 251(c)(4) of the 1996 Telecommunication Act ("Act") provides that a competitive local exchange carrier may be restricted from selling services to a different category of subscribers, and that telecommunications carriers are

a different category of subscribers than end users (carrier or non-carrier end users). SBC Ex 1.0 (Pellerin), at 6-7. Thus, while MCI may purchase, from SBC at a wholesale discount, the set of services that SBC offers, at retail, to its end user subscribers and resell these services to the same set of end user subscribers, MCI may not resell these services to a different category of subscribers. Specifically, MCI may not resell SBC's retail services to telecommunications carriers for the provision of telecommunication services by those carriers. SBC Ex. 1.0 (Pellerin), at.6-7.

We agree with Staff that Section 251(c)(4) allows state commissions to prohibit cross-class selling — reselling services, offered at retail to one class of subscribers, to a different class of subscribers. Section 251(c)(4) itself does not prohibit any or all cross-class reselling. Staff Ex. 2.0 (Liu), at 12-13. The FCC agreed that Section 251(c)(4) permits states to prohibit resellers from selling residential services to business customers and to prohibit the resale of Lifeline (and other means-tested) services to end users not eligible for such services. The FCC, however, did not conclude that restrictions on all types of cross-class selling were permitted. For example, the FCC was not inclined to “allow the imposition of restrictions that could fetter the emergence of competition.” Thus, Staff maintains, and we concur, that SBC's proposed prohibition on cross-class resale is something that the Commission can order under FCC rules, but need not order. Staff Ex. 2.0 (Liu), at 12-13.

We find that neither of MCI's arguments, based on Section 251 or Local Competition Order, is convincing. First, MCI contends that there are only two permissible prohibitions on cross-class reselling: (1) residential services to business customer, and (2) Lifeline (and other means-tested) services to end users not eligible for such services. SBC's restriction falls outside of the two permissible prohibitions and thus is prohibited by the FCC rulings. MCI Ex. 6.0 (Price), at 103-106. We agree with Staff that FCC does not preclude state commissions from making prohibitions on any other types of cross-class reselling, other than “residential/business” or “mean-tested” cross-class resellings. While presuming prohibitions or restrictions on other types of cross-class reselling unreasonable, the FCC finds that the incumbent LEC may rebut this unreasonableness presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory.” That is, the Commission may make the determination that SBC's proposed restriction is reasonable and nondiscriminatory. Staff Ex. 2.0 (Liu), pp.16-17.

We concur with Staff that the FCC's disinclination “to allow the imposition of restrictions that could fetter the emergence of competition” does not support MCI's position. As Staff notes, MCI does not explain why and/or how a prohibition on a reseller chain (*i.e.*, prohibiting a reseller from reselling to another reseller or a third carrier) would in any way “fetter the emergence of competition”. The creation of resale market can benefit end user customers by introducing competition in marketing, billing, collection, and other functions that help to reduce the costs of provisioning resold services to end users, which in turn helps to lower rates charged to end users. All else equal, the longer the reseller chain between SBC's services and end users, the more transaction costs would occur, which ultimately would translate into higher rates charged to the end users and thus harm end users. Thus it is unclear how fewer layers

of resellers would fetter competition and harm end users, particularly in view of the fact that each certified telecommunication carrier has the option of obtaining the wholesale-discounted services directly from SBC. Staff Ex. 2.0, pp.17-19.

We disagree with MCI that SBC's restriction will cause MCI to violate the Act because MCI cannot, under Section 251(b)(1) of the Act, refuse to resell the resale services, obtained from SBC at wholesale discount, to a third carrier for the provision of telecommunications services to customer. MCI Ex. 6.0 (Price), at 103-106. We concur with Staff that SBC may not, under the non-discrimination provision in Sections 251(b)(1), restrict MCI's ability to resell services to third party carriers who purchase the services for its own use as end users of the services. Carriers, when purchasing the resold services for the provision of telecommunications services by those carriers, are clearly a different class of subscribers from end users of the services. Staff contends, and we concur, that Section 251(b)(1) does not, of necessity, prohibit such a cross-class selling restriction. Staff Ex. 2.0 (Liu), at 22-23.

Staff notes, and we agree, that 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. Therefore, some restrictions are necessary to address the potential adverse effects arising from reseller chains. Staff Ex. 2.0 (Liu), at 17-19, 23, 26-7; Staff IB, at 40-41.

We note that MCI fails to respond to SBC's practical concerns raised over unrestricted resale by MCI to third carriers for the provision of telecommunications services.

We agree with Staff that, while SBC's practical concerns may have merits, SBC has failed to show why these concerns cannot be addressed by additional contract language. Staff Ex. 2.0 (Liu), at 24-25. SBC in rebuttal contends that Staff proposed additional language may not be sufficient to limit "a CLEC's ability to circumvent restrictions on obtaining discounted services for its own use". SBC Ex. 1.1 (Pellerin), at 82-85. SBC, however, does not propose any addition to Staff's proposed limiting language.

After considering all evidence and arguments before us, we conclude that some restrictions are necessary to address the potential adverse effects (including those raised by SBC) arising from unrestricted resale by MCI to a third carrier for the provision of telecommunications services. We require that parties include Staff's proposed limiting language for sub-issue 2 (under Resale 1) in their ICA.

RESALE Issue 4

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

Commission Conclusion

Resale 4 essentially deals with whether SBC's wholesale service offerings should mirror its retail services offerings to its end user customers. SBC takes the position that its wholesale service offerings should mirror its retail services offerings to its end user customers. In particular, MCI should be permitted to aggregate traffic to multiple end user customers only to the extent that such an aggregation of traffic is permitted by SBC retail tariff. SBC Ex. 1.0 (Pellerin), p.17-18. MCI on the other hand claims that SBC's restriction on aggregation of traffic "reverses the FCC's position" on aggregation of traffic and is anti-competitive. MCI Ex. 5.0 (Lichtenberg), at 4-5.

SBC notes that the Commission has previously considered this issue and approved SBC's currently effective Resale Tariff, which contains such limiting language on aggregation of traffic. In addition, SBC contends that "MCI is only entitled to resell those telecommunications services SBC Illinois offers at retail, not something different." SBC Ex. 1.0 (Pellerin), p.17. We agree with Staff that Section 251(c)(4) clearly requires that SBC offer for resale a service that it offers at retail to its end user customers. But it does not require SBC to offer, for resale, a service that SBC does not offer, at retail, for its own end user customers. Likewise, it does not require that SBC tailor its retail service offering to fit the business plans of resellers. Staff Ex. 2.0 (Liu), at 29-30; Staff IB, at 41-42.

We do not find either of MCI's arguments against restrictions on aggregation of traffic well founded. As Staff notes, it is correct that FCC established a presumption of unreasonableness for restriction on aggregation of traffic (in the Local Competition Order). The FCC, however, does not preclude a state commission from permitting such restrictions or any cross-class reselling restrictions. We have previously considered this issue regarding aggregation of traffic and approved SBC's currently effective Resale Tariff, which contains such limiting language on aggregation of traffic. Staff Ex. 2.0 (Liu), at 28-29.

In our view, SBC's proposed language clearly provides that resellers are able to take advantage of the same volume discounts as SBC retail's end user customers are permitted to do so. SBC's limiting language on aggregation of traffic is thus not unreasonable or discriminatory. We agree with Staff that MCI's claim that SBC's restriction on aggregation of traffic prevents MCI from receiving volume discounts that SBC is able to offer to its end user customers is unfounded. Staff Ex. 2.0 (Liu), at 31.

We find MCI's anti-competitive argument unpersuasive. In support its anti-competitive argument, MCI contends that that MCI would be able to offer resale services to end users more efficiently if SBC does not impose restrictions on service aggregation (or volume discount). MCI Ex. 5.0 (Lichtenberg), at 6. Thus SBC's restriction prevents MCI from attaining operational and cost efficiency. MCI may be correct in that MCI (as a reseller) might be able to make more profits if there is no restriction on service aggregation. It, however, misses the point. MCI clearly has misinterpreted the explicit and clear requirements of Section 251(c)(4) and Section 252(d)(3). Section 251(c)(4) requires that SBC offer, for resale, any services that it

offers, at retail, to its own end user customers. It does not require SBC to offer for resale a service that SBC does not offer, at retail, to its end user customers.

As Staff notes, Section 251(c)(4) resale service is only one of the several methods through which competitive LECs can compete with SBC in the local exchange service market. Obviously, it may not be the most suitable method for all telecommunications carriers. MCI, like any other CLECs, selects the method(s) that is most suitable for it to compete and best fits its own business plan. MCI, however, cannot, under Section 251(c)(4), require SBC to tailor its retail services offerings to fit MCI's needs for resale services to effectuate its business plan, or require SBC to offer for resale a service that SBC does not offer at retail for its own end user customers. MCI proposes language, which would require SBC to offer, for resale, a service that SBC does not offer, at retail, to its own end user customers, clearly goes beyond the requirements under Section 251(c)(4), and is thus unreasonable. Staff Ex. 2.0 (Liu), at 32-33.

Therefore, we conclude that SBC's proposed language under Resale 4 is reasonable and non-discriminatory, and thus should be included in parties' ICA.

RESALE Issue 8

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

Resale Issue 8 deals with which party's proposed language governing the reselling of Customer Specific Arrangement (CSA) should be incorporated into the ICA. The parties do not present specific issues, but simply offer competing contract language regarding the reselling of Customer Specific Arrangement (CSA).

SBC offers three arguments as to why its proposed language is superior to MCI's language. SBC contends that its language, in contrast to MCI's proposed language, puts explicit limits on the assumption of existing retail contracts, and explicitly states the exact wholesale discount applicable to a contract assumption. SBC also contends that its language sets specific terms and conditions, including termination liability, that apply when MCI elects to terminate an assumed contract. SBC Ex. 1.0 (Pellerin), at 23-24. The Staff agrees with SBC regarding the superiority of its proposed language. Staff Ex. 2.0 (Liu), at 36-37.

MCI, while contending that SBC's proposal adds unnecessary or ambiguous language, does not point out what specific language (proposed by SBC) that MCI considers unnecessary or ambiguous. MCI advocates its proposed language because it is straightforward. MCI, however, fails to why and how its proposed language is more straightforward than SBC language. Conversely, it does not explain which portion of SBC language is less straightforward than MCI's language. MCI Ex. 5.0 (Lichtenberg), at 10. Staff has pointed out these deficiencies in MCI arguments, but MCI declines to respond. Staff Ex. 2.0 (Liu), at 35-37.

We concur with Staff that SBC's language under Resale 8 is more appropriate and therefore should be adopted.

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?

Commission Analysis and Conclusion

This issue is essentially a dispute over the operation of the "change of law" process and "declassified" network elements. On the one hand, SBC argues that due to certain potentially imminent Section 251 declassification of the switching, enterprise market loops and dedicated transport elements, the existing change of law provisions are insufficient and a new process should be instituted to accommodate the anticipated change of law regarding these elements. On the other hand, MCI's proposed language barely addresses this unique situation.

We agree with the Staff that SBC has failed to present a persuasive case that, as a general matter, the change of law process should be superseded. Staff Ex. 1.0 (Hoagg) at 16. It is the Commission's understanding, as well as that of the Staff's, that the "change of law" process has been widely accepted and utilized by the industry and incorporated into interconnection agreements. See e.g., Triennial Review Order, ¶¶700-706. The Commission finds no compelling reason this pre-existing industry-wide approach cannot continue to be the case *generally* with respect to UNE issues. Staff Ex. 1.0 (Hoagg) at 16. In reaching our conclusion, we also note that the FCC presumes these provisions can function well enough in an environment of element declassifications. Interim Requirements Order, ¶22. This conclusion is also consistent with a recent Commission decision, moreover, where we rejected a similar proposal by SBC in another arbitration. 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).

Regarding MCI's proposed language in Section 1.1.1, the Commission agrees with the Staff and finds that it 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, moreover, finds that the current unique circumstances surrounding the potential imminent Section 251 declassification of the switching, enterprise market loops and dedicated transport elements to be unprecedented. In our view, and 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. Given certain findings of the TRO, the USTA II decision and the

FCC's Interim Order, the Commission has a reasonable degree of confidence that at least some further declassifications will occur with respect to switching, loop and dedicated transport elements. Interim Requirements Order, ¶22.

The Commission, accordingly, directs the parties to draft language creating two explicit and limited exceptions to the usual operation of change of law provisions in accordance with the recommendations of Staff witness Mr. Hoagg. Staff Ex. 1.0 (Hoagg) at 18. The first of these exceptions should be for elements that currently are declassified. The second exception 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).

Finally, as recommended by the Staff, the Commission concludes that these provisions should be self-effectuating and, thus, would require no further amendment to the agreement to operate. These provisions should also be limited directly and explicitly to the elements in question. The agreement change of law provisions will apply to all other future potential declassifications.

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?

Commission Analysis and Conclusion

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.

The Commission disagrees. "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, the 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.

However, the Commission does not agree completely with MCI’s position. As decided in our Section 13-801 Implementation Order, CLECs may resell intraLATA toll to other interexchange carriers (“IXCs”).⁵ In addition, the Order provided 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.”⁶ Therefore, as a matter of current state law, the Commission has permitted the imposition of resale restrictions on CLECs requesting use of UNEs.

MCI relies, in part, upon the Commission’s AT&T Arbitration Decision in support of its position. The Commission’s AT&T Arbitration Decision is not definitive with respect to Issue UNE 5 in this proceeding. 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. MCI proposes the following language:

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

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.

The Commission hereby orders the parties to include language in the ICA stating that: (1) SBC must permit MCI to resell intraLATA toll to IXCs when MCI provides service using SBC UNEs; and (2) MCI may not resell EELs, but must use them to provide service to MCI’s end users or payphone providers. We have insufficient information to allow it us to both identify and resolve any further specific disputes at this time.

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?

⁵ MCI Ex. 8.0 at 47.

⁶ 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.

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?

Commission Analysis and Conclusion

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, we 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.

Arbitration Decision, 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(September 9, 2004).

Each of these issues, like those in our recently concluded XO Arbitration, concerns the implementation of TRO provisions that were modified or nullified by the DC Circuit Court’s decision in USTA II. Therefore, our determination in the XO Arbitration is as appropriate and applicable to this arbitration as it was in that proceeding, and we will 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.

We, accordingly, conclude that our determinations in this proceeding will take full account and consideration of the DC Circuit Court’s decision in USTA II and, therefore, we order the removal of Section 3 of the Appendix XXIII, Unbundled Network Elements (UNE) from the ICA.

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?

Commission Analysis and Conclusion

We reject SBC's proposed language for UNE Section 3.7. We agree with the Commission Staff (Staff Ex. 1.0 (Hoagg) at 20) that SBC, in addition to its Section 251 obligations, is obligated to provide unbundled elements pursuant to Section 271 of the Act and Section 13-801 of the PUA.

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?

Commission Analysis and Conclusion

Although the Staff recommends that the agreement specifically identify those elements that have been "Section 251 declassified", and SBC's proposed language as for UNE Issue 11 accomplishes that, the Staff further recommends that SBC's proposed language be rejected. The Staff points out that SBC's proposed revisions and additions as set forth in UNE Issue 11 fail to reflect SBC's obligations for the "interim period" under the FCC's Interim Order, as clearly contemplated by the FCC. Nor, the Staff notes, 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. Staff Ex. 1.0 (Hoagg) at 22. The Commission agrees with the Staff's recommendation concerning UNE Issue 2 as the appropriate resolution of UNE Issue 11 and directs the parties to draft language conforming with the Staff's recommendations. Consequently, we specifically instruct the parties that contract change of law provisions should continue to apply in circumstances surrounding potential future Section 251 declassifications.

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?

Commission Analysis and Conclusion

We reject SBC's proposed revisions and additions as set forth in UNE Issue 12 for the same reasons we rejected SBC's proposed language in UNE Issue 11 above. As the Staff pointed out (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. 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. We agree with Staff witness Mr. Hoagg that here in Illinois, at least, the fundamental effect of "Section 251 declassification" is that any element(s) involved no longer need be provisioned at TELRIC prices. Id.

The Commission recently addressed the appropriate administrative/operational processes to occur upon Section 251 declassification of a network element are addressed in our Commission's *XO Arbitration Decision*, in which regard we found 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

The processes we adopted in the *XO Arbitration Decision* are generally applicable in this arbitration. See Staff Ex. 1.0 (Hoagg) at 26 (recommending adoption of identical provision of Proposed Order in the same proceeding). The Commission, however, agrees with the Staff recommendation that we consider two departures from this proposal. First, we find that since the most significant impact of Section 251 declassification generally concerns the pricing of a network element, that a maximum 30-day implementation period (post proper notification) is sufficient (as opposed to the 60 day period recommended in the *XO Arbitration Decision*). Second, these conclusions contained in the *XO Arbitration Decision* do not reflect SBC's obligations to provide unbundled elements under Section 271 of the 1996 Act and Section 13-801 of the Illinois PUA. The Commission, accordingly, as in UNE Issue 11, directs the parties to draft language conforming with the Staff's recommendations.

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?

Commission Analysis and Conclusion

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 seek dispute resolution or other remedial measures.

The Commission therefore accepts SBC's proposal to include language in the ICA that references eligibility criteria applicable to combinations. However, the Commission rejects the last sentence of SBC's proposed language, which contains SBC's example of qualifying services eligibility criteria vacated by USTA II. Staff IB, at 50.

UNE Issue 14

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

Commission Analysis and Conclusion

SBC takes the position that it should provision conversions under its existing processes, except for those situations where there is no existing process. When those conversions are identified, SBC will develop and implement such processes, and the parties then will comply with Change Management guidelines. 8/10/04 DPL, Issue UNE 14.

MCI has offered a proposal that circumvents SBC's current provisioning process and instead creates a provisioning system unique to MCI. MCI Ex. 14.0 at 24. 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. Included in MCI's proposed system is a 30-day provisioning requirement. MCI argues that its suggested language will allow

SBC some relief from the proposed thirty (30) day provisioning interval in those instances when MCI asks for an “other conversion;” however, an explanation of what an “other conversion” does not appear in MCI testimony or proposed language. The support that MCI provides for its 30-day requirement is an FCC observation that conversions are largely a billing function. MCI Ex. 14.0 at 24.

While the Commission acknowledges that converting between wholesale services and UNEs is likely to be largely a billing function, this fact alone does not support MCI’s proposal. As the FCC also acknowledged, specific provisioning criteria are best established between the parties with the most knowledge of how provisioning actually occurs.

The Commission rejects 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. There are now conversion processes in place for most conversions, and there is a change management process already in place to effectuate new ones. See Staff Ex. 6.0 (Zolnierek) at 21-22. The parties should work in collaboration with the industry to develop provisioning processes where they do not exist today. The Commission agrees with Staff’s position that the development of a unique process for each carrier for the purchasing of similar services and products is, without some identifiable justification, unnecessarily duplicative, and a waste of resources.

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 to provide UNEs?)

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

Commission Analysis and Conclusion

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 affects unbundling obligations (MCI proposes that such change of law events be addressed 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.

This Commission does not share MCI's concern that that SBC's proposed language grants SBC unilateral change-of-law rights. However, the Commission agrees with Staff that these concerns can be addressed with additional language. See Staff IB, at 51. The Commission therefore accepts SBC's proposal to include language in the ICA that specifies that SBC must commingle to the extent required by FCC rules and orders, and further orders that the parties include language that makes it clear that SBC's proposed language does not confer upon SBC any unilateral change-of-law rights, and clarifying that in the event of state or federal law changes with respect to commingling, either party is entitled to invoke the contracts change of law provisions.

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?

Commission Analysis and Conclusion

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, the Commission agrees with staff that MCI's proposed definition of commingling is consistent with, and derives from, the FCC's definition of commingling in the TRO. See 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.

Therefore, the Commission accepts 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 directs 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. The parties are not to interpret this decision, which approves the definition of a combination of a Section 251 UNE and a wholesale service as a commingled arrangement, as implying that SBC must offer such a commingled arrangement to MCI.

UNE Issue 19

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

Commission Analysis and Conclusion

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 already 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. Condition (iv) is therefore 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) is hereby rejected.

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. The Commission agrees with Staff that SBC's proposed conditions (ii), (iii), and (v) are proper. See Staff Ex. 6.0 (Zolnierek) at 38. The remainder of the conditions are improper and should be excluded from the ICA. See Staff RB, at 44.

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?

Commission Analysis and Conclusion

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 for SBC to meet. For this reason, the Commission agrees with Staff that 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. See Staff IB, at 53. Regarding the format of requests, the Commission hereby orders the parties to include language in the ICA that specifies that requests are to be submitted in BFR format, rather than in MCI's suggested spreadsheet format.

In addition, MCI raises the further issue of what constitutes an “initial request.” MCI Ex. 12.0 at 10-11. In the absence of the parties’ providing this Commission with any specific information regarding the commingling configurations now at issue, the Commission is unable to offer specific direction. This Commission has no indication of what the configurations will look like, and similarly has no guidance regarding how similar or dissimilar they will be from one another with respect to provisioning. Therefore, the Commission is 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 and are not amenable to the dispute resolution mechanisms in the ICA, the Commission agrees with Staff that the parties should include language in the ICA that would permit the parties to bring these disputes to the Commission for resolution. See Staff IB, at 53-54.

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 is denied. The Commission agrees with Staff that the physical provisioning intervals should be unaffected by the work of SBC’s legal staff.

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

UNE Issue 21

Statement of Issue: Which Party’s “ratcheting” proposal should be included in this agreement?

Commission Analysis and Conclusion

The parties have expressed no disagreement here with respect to the identified issue. Therefore, the Commission accepts the proposed language submitted by both parties for this issue. In particular, the Commission accepts SBC’s language regarding billing for non-UNE elements, and accepts MCI’s language regarding the relationship between FCC ratcheting pronouncements and the denial of commingled arrangements. MCI’s suggested language at the end of Section 7.5.1 is to be included in the agreement. See MCI Ex. 12.0 at 12.

UNE Issue 22

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

Commission Analysis and Conclusion

The Commission rejects the proposed language of both parties with respect to this issue. Specifically, the Commission rejects 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 does 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. 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 also rejects SBC's proposal to reference its federal tariffs as the purpose of this reference is neither explained nor identifiable. Thus, we reject both parties proposed language on this issue and find that no such language is needed or appropriate in the instant ICA.

UNE Issue 25

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

Commission Analysis and Conclusion

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, thus, rejects 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.

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?

Commission Analysis and Conclusion

The Commission rejects SBC's proposed additional language. We adopt the Staff's recommendation 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 FCC's rules and its TRO order, the Commission adopts the Staff's recommendation as being the most consistent with FCC requirements.

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?

Commission Analysis and Conclusion

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 proposed limitations and removes 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. However, the Commission agrees with Staff that SBC should not 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. See Staff RB, at 24.

In accordance with Staff's recommendation, the Commission hereby orders the parties to include in the ICA 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.

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 is hereby rejected and should not be included in the ICA.

The Agreement also should include language assigning the burden of proof to SBC when it alleges 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.

In addition, this Commission accepts 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. However, the Commission should order the parties to amend the language proposed by SBC to instead 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).

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?

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?

SBC UNE Issue 4

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

Commission Analysis and Conclusion

The Commission agrees with Staff's recommendation to reject SBC's proposed language for each of these three 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 exception noted by Staff: loops and dedicated transport at OCn capacity levels have been declassified as Section 251 UNEs, and thus need not be provided at TELRIC rates. See Staff IB, at 60-63.

The Commission endorses SBC's proposal to codify its obligations regarding these elements under the FCC Interim Order in a Rider attached to the ICA. However, as Staff notes, SBC also remains obligated to provide each of the above-named elements pursuant to requirements of PUA Section 13-801 (albeit at non-TRILIC prices). These obligations should 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.

This Commission conditions its approval of SBC's proposal of attaching a rider to the ICA on SBC's 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 outlines the FCC's intent concerning these elements during this second six-month period. The inclusion of language reflecting this intent will obviate the need for another change of law proceeding in the event the FCC's stated expectations are realized. Therefore, the parties should include language in the Rider providing that such provisions are null and void if the FCC takes actions other than those it currently intends.

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?

Commission Analysis and Conclusion

The Commission rejects SBC's proposed language on this issue. The requirements of the FCC's Interim Order refute 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". The Commission agrees that SBC's

proposed language concerning SBC UNE Issue 5 therefore must be rejected, and replaced with language that, at minimum, properly reflects these obligations. See 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 needs 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. See Staff IB, at 63-64; Staff Ex. 1.0 (Hoagg), at 36-37.

xDSL Issue 8

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

Commission Conclusion

The issue of YZP is best described as 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.

YZP is an alternative ordering process for CLECs ordering xDSL loops. 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. This conditioning may be requested during the initial provisioning process or after the xDSL loop has been installed. 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.

MCI believes the same terms and conditions as applied for general trouble ticket dispatch should apply to YZP trouble ticket dispatch. 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.⁷

SBC Illinois outlines four situations in which SBC Illinois incurs unnecessary expenses due to non-performance by MCI. In each of the 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.⁸

The Commission agrees with Staff and finds that the interconnection agreement should include the YZP trouble ticket language proposed by SBC Illinois in Sections

⁷ Master List of Issues, Illinois MCI Negotiations, xDSL- Decision Point List (DPL), 7/16/04, pp. 20-21.

⁸ Master List of Issues, Illinois MCI Negotiations, xDSL- Decision Point List (DPL), 7/16/04, pp. 20-21.

3.3.3.1 through 3.3.3.4. This language will have MCI compensate SBC Illinois for expenses SBC Illinois incurs due to MCI's non-performance. The philosophy of "cost causer pays" should extend to both parties. 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.

III. CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its proposed Commission Conclusions be adopted in their entirety consistent with the arguments set forth herein and in its post-hearing briefs.

Respectfully submitted,

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