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 d/b/a SBC Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996	)	Docket No. 04-0469

SBC ILLINOIS' SUBMISSION OF PROPOSED COMMISSION CONCLUSIONS

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SBC ILLINOIS' SUBMISSION OF PROPOSED COMMISSION CONCLUSIONS

Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC") respectfully submits its proposed Commission Conclusions for inclusion in the Administrative Law Judges' Proposed Arbitration Decision ("PAD"). The bulk of this submission consists of SBC's proposed conclusion on each individual issue presented for arbitration. Because of the unique circumstances surrounding the UNE issues in light of, among other things, the FCC's recent *Interim Order*, however, SBC suggests that the PAD include a separate discussion of the legal principles that are applicable to many of the UNE issues in the case. We present that discussion as Section I of this submission.

Section II consists of SBC's proposed Commission Conclusions on each of the individual arbitration issues. On many issues, the parties' previous submissions present alternative paths to resolution. For example, there are many UNE issues that SBC and Staff contend the Commission need not reach because they are moot, but on each such issue, SBC has advocated contract language in the event the Commission concludes the issue is not moot. In Section II, we set forth alternative conclusions for all such issues, and specify in each instance which alternative reflects SBC's principal position.

I. OVERARCHING UNE QUESTIONS

The parties and Staff identified "overarching" questions that affect the resolution of several arbitration issues. The principal disagreement related to unbundled access is whether the ICA should include any terms or conditions for unbundled access to network elements that the FCC's *Triennial Review Order* held did not have to be unbundled (including enterprise market switching and OCn level loops and transport facilities) or that the *TRO* held did have to be unbundled in rules that the D.C. Circuit then vacated in *USTA II* (namely, mass market switching, enterprise market loops (DS1, DS3 and dark fiber), and dedicated transport (DS1, DS3, and dark fiber)). The FCC's August 20, 2004, Order and Notice of Proposed Rulemaking

(the "*Interim Order*"), while adopting interim requirements governing the unbundling of mass market switching, enterprise market loops, and dedicated transport, also "forecloses the implementation and propagation of the vacated rules" that had required incumbents to provide unbundled access to those network elements. *Id.* ¶ 23. The ALJ directed the parties to submit briefs and reply briefs on the impact of the *Interim Order*, and the parties addressed the *Interim Order* in their merits briefs, reply briefs, and position statements. As explained below, the proper treatment of the recent developments in federal law governing the unbundling of network elements is as follows:

First, the ICA cannot include rates, terms or conditions related to unbundled access to the network elements declassified by the *TRO* or *USTA II* or to related network elements or combinations of network elements. Accordingly the issues in this arbitration concerning contract language relating to those network elements are moot.

Second, to accommodate the FCC's interim requirements (in the event that this ICA is approved while those requirements are still in effect), the new ICA can include a rider that allows MCI to obtain the benefit of those requirements during the period (if any) between the ICA's effective date and the expiration of the interim requirement period.

Third, the ICA should not address the transitional plan that the FCC is considering for the period after the interim requirement period expires, because the FCC has not adopted the proposed transitional plan.

Fourth, the Commission cannot lawfully require network elements that have been declassified under federal law to be unbundled pursuant to state law in this proceeding, because, among other reasons, MCI did not ask for state law unbundling of such network elements in its arbitration petition and, in any event, state law does not authorize, and could not lawfully authorize in the face of federal law to the contrary, the unbundling that MCI belatedly requested.

Fifth, the Commission cannot lawfully require the unbundling of network elements pursuant to Section 271 of the 1996 Act in this proceeding, because, among other reasons, the 1996 Act does not permit state commissions to impose Section 271 duties in Section 252 arbitrations.

1. The *Interim Order* requires SBC to continue, for a limited time, to provide CLECs with unbundled access to certain network elements on the terms and conditions that were in those CLECs' interconnection agreements as of June 15, 2004. The *Interim Order* does not, however, authorize that requirement to be embodied in the parties' new interconnection agreement. On the contrary, the FCC has declared that its interim rules would not permit CLECs to obtain new contracts under the vacated rules. Accordingly, any MCI entitlement to UNEs pursuant to the *Interim Order* cannot properly be made part of the ICA the parties are arbitrating. Any rights MCI has under the *Interim Order* are to be memorialized in a rider to this ICA, as discussed in more detail below.

The question thus becomes: Outside the limited period of time that would be covered by the *Interim Order* rider, how should this ICA deal with network elements that pre-*Interim Order* federal law held were not subject to unbundling? The Commission holds that the ICA cannot

lawfully require the unbundling of those network elements – including mass market switching, enterprise, market loops and dedicated transport – because *USTA II* vacated the FCC rules that required them to be unbundled. Consequently, all issues having to do with the terms and conditions for unbundling those network elements are moot.

With the *TRO* having declassified enterprise market switching and *USTA II* having declassified mass market switching, the ICA can include no contract language for unbundled switching at all. Consequently, there also can be no contract provisions for network elements (*e.g.*, shared transport) or functionalities (*e.g.*, call-related databases) that CLECs were entitled to access on an unbundled basis only through SBC's unbundled local switching. Nor can there be provisions governing network element combinations that include elements that have been declassified, such as the "UNE Platform" or "UNE-P" (which includes local circuit switching and shared transport) and "Enhanced Extended Loops or "EELs" (which include dedicated transport and typically also include enterprise market loops).

2. The *Interim Order* requires SBC to continue to provide, during a specified interim period and with certain exceptions, unbundled access to mass market switching, enterprise market loops, and dedicated transport "under the same terms and conditions that applied under [CLECs'] interconnection agreements as of June 15, 2004." *Interim Order*, ¶ 1. SBC does not believe that the *Interim Order* freeze needs to be memorialized in contractual form, and Staff similarly understands the *Interim Order* to be "self-executing." Nevertheless, SBC has offered a "rider" that provides that the parties will abide by the *Interim Order* for so long as the interim requirements are in place. The rider will permit MCI to take full advantage of any and all benefits that are even arguably conferred by the *Interim Order*. Staff concurs with SBC's "rider" alternative. Staff Reply Br. at 9. The Commission accordingly adopts the rider proposed by SBC.

3. In the *Interim Order*, the FCC discussed a transition plan for the six-month period after the FCC issues permanent rules. Specifically, the FCC proposed "a second six-month period during which competitive carriers would retain access to network elements that the Commission has not subjected to unbundling, but only for existing customers and at transitional rates that are modestly higher than those available on June 15, 2004." *Id.* ¶ 16. However, the FCC has said its proposal "has no legal force whatsoever," but is merely "a proposal that the agency may or may not adopt when it issues final rules." The Ordering Clauses at the end of the *Interim Order* plainly state that the interim requirements established in the Order are adopted, but not the proposed transition plan. Accordingly, the Commission finds that the ICA should not incorporate or reflect the FCC proposals regarding the second six-month "transition period."

4. The Commission declines to require the unbundling under state law of any network elements that have been declassified under federal law, either by the *TRO* or by *USTA II*, in this Agreement. First, MCI did not raise in its Petition the state law issues it now wants the Commission to resolve. Section 252(b)(4)(A) of the 1996 Act confines this arbitration to the issues set forth in the Petition and the Response. In its Petition, MCI did not seek unbundled access to many of the network elements that it requested for the first time in its final round of testimony, namely, the network elements that the *TRO* held were not to be unbundled. Moreover, MCI's proposed contract language included no provisions for those network elements (*see, e.g.*, MCI's proposed UNE Sections 9.1.1, 13.4.1, and 15.1.1), and MCI's first round of

testimony even acknowledged that they are *not* to be unbundled. Further, in instances where MCI did seek access to network elements that have been declassified by the *TRO* (such as feeder subloops and entrance facilities), MCI based its requests on incorrect interpretations of Section 251 of the 1996 Act and FCC rules *not* on the basis of an alleged state law unbundling requirement. The Commission cannot now impose unbundling duties on SBC that MCI did not ask for – indeed, acknowledged did not exist – in its Petition and first round of testimony. And while Staff's general guidance supports the unbundling of certain network elements under state law, Staff agrees with SBC that MCI cannot rely on Staff's guidance if MCI has conceded in negotiations that a particular UNE need not be provided, or if it otherwise waived or did not pursue its rights to any particular UNE. Staff Reply Br. at 5, n.1.

Further, MCI's state law theory improperly invokes Section 13-801(d) of the PUA and the Commission's initial order implementing that statute in Docket No. 01-0614. The Commission did *not* hold that section 13-801 requires unbundling of individual network elements (like the declassified network elements at issue here) without regard to the "necessary and impair" standard of federal law. To the contrary, sections 13-801(d)(1), (2), and (3) self-consciously track the federal Act and the FCC's implementing rules. To be sure, the Commission construed section 13-801(d)*(4)* to impose an obligation to provide access to certain *combinations* of network elements without regard to whether all the individual elements themselves had to be unbundled, a decision that SBC has challenged and that the Commission is reconsidering on remand from the federal district court in Docket No. 01-0614. But section 13-801(d)(4) does not address individual network elements, and the only *combinations* it addresses are existing "network elements platform[s]," which excludes combinations such as EELs (which consist of a loop and dedicated transport) that are used by a CLEC in conjunction with other facilities or functionalities, such as a CLEC switch.

The obligations of an incumbent with respect to *individual* network elements are addressed not by subsection 13-801(d)(4), but by subsection 13-801(d)(1), which expressly references "*unbundled* network elements," thereby limiting the incumbent's obligations to those network elements to which the incumbent must provide unbundled access under federal law. Except in the narrow case of an existing platform, the Commission has already determined that state law access to network elements *is* governed by a finding of impairment, consistent with federal law. In particular, Section 720.390 of the Commission's rules, titled "Access to Unbundled Network Elements," provides that an ILEC must offer (1) UNEs required by FCC rules, and (2) other UNEs that the Commission determines must be unbundled "consistent with the Federal Act, the Act and decisions of the federal courts and the FCC." In adopting this rule in Docket No. 99-0511, the Commission expressly stated that it "has endeavored to ensure that the new Part 790 is consistent with [Public Act] 02-0022," which includes Section 13-801. Mar. 27, 2002 *Order*, Docket No. 99-0511, at 1, *modified in part*, *Second Notice Order* (Jan. 23, 2003). The Commission then held that "delineating specific UNEs involves a detailed process geared toward satisfying the requirements of TA96." *Id*. at 125.

Even with respect to *combinations*, the obligations of an incumbent carrier are addressed by section 13-801(d)(3), which states that combinations are to consist of "*unbundled* network elements," and which the Commission did *not* construe to eliminate the federal impairment test. In contrast to Section 13-801(d)(4), the Commission interpreted Section 13-801(d)(3), which imposes on SBC the obligation to provide certain new combinations of "*unbundled* network

elements," including new network element platforms, as not eliminating the need for an impairment determination. June 11, 2002 Order, Docket No. 01-0614, ¶¶ 167-68.

The Commission refuses to either (i) *expand* its holding in Docket No. 01-0614 and order unbundling of individual network elements without regard to federal law, or (ii) *transplant* its holding on existing platform combinations from Docket No. 01-0614 into the agreement here. This is not the time or place for either action. This is an arbitration conducted to implement federal law. Even now, the Commission is in the process of reconsidering its initial interpretation of section 13-801 in light of federal law, and it will not use this federal proceeding to create *new* conflicts with federal law. Nor will the Commission incorporate such conflicts into the federal interconnection agreement here, based solely on the happenstance that this arbitration occurred while the Commission's initial order in Docket No. 01-0614 is still under reconsideration, especially since the Commission has found questions of law in that order that were sufficiently serious to request a remand from the federal district court and to reopen the docket. Moreover, the construction of section 13-801(d)(4) advocated by MCI would use section 13-801(d)(4) to nullify the express limitations of section 13-801(d)(1) and (d)(3), contrary to the settled canon that "sections of the same statute should be construed as being consistent rather than inconsistent and should be interpreted as being *in pari materia*." *Mann v. Bd. of Educ.*, 406 Ill. 224, 230 (1950). Further, construing section 13-801(d)(4) to eliminate the federal "necessary" and "impair" standards would also violate the tenet that statutes are to be construed to avoid, rather than engender, serious constitutional questions. *People v. Williams*, 119 Ill. 2d 24, 27 (1987).

Finally, the 1996 Act requires the Commission to ensure that its resolutions of the open issues "meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). In this proceeding to implement federal law, the Commission cannot ignore federal law, and in particular it cannot ignore the federal requirement of "impairment." The Commission cannot impose, under the rubric of state law, the exact same "more unbundling is better" regime that Congress, the Supreme Court, and the D.C. Circuit have so thoroughly repudiated as destructive of national telecommunications policy. Unbundling is a balance among competing goals. Federal law imposes a "necessary and impair" test that must be applied before an incumbent carrier may be required to "unbundle" network elements for its competitors. 47 U.S.C. § 251(d)(2). That test requires a careful "balance[]" of the benefits *and* costs of unbundling, including the reduced incentives to invest and innovate that forced sharing engenders (*USTA I*, 290 F.3d at 427). Congress rejected a "blanket" – or even a "more is better" – approach to an incumbent's duty to share its network. *AT&T*, 525 U.S. at 387-90 (majority opinion); *id*. at 429-30 (Breyer, J., concurring in relevant part); *USTA I*, 290 F.3d at 425-2. Any attempt to impose such a regime under state law would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and would be preempted. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

Even for mass market switching, enterprise market loops, and dedicated transport, where the *TRO* did require unbundling, the D.C. Circuit vacated the FCC's rules as unlawful. The FCC is formulating new rules in an effort to properly *limit* unbundling and *promote* facilities-based competition, and it has stated that state commissions are to operate under the presumption that *no* unbundling will be required. *Interim Order*, ¶ 22. Federal law precludes the Commission from

usurping the FCC's role in achieving the balance that unbundling requires. Congress assigned to the FCC the task of determining what "network elements" incumbents must offer on an unbundled basis. After all, that was the point of *USTA II*'s vacatur of the attempted delegation of FCC authority embodied in the *TRO*. The D.C. Circuit's underlying concern – that the state commissions might "not share the agency's national vision and perspective, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme" (*USTA II*, 359 F.3d at 565-66) – applies with at least the same force whether the states cite federal or state authority to pursue such goals.

The Commission does not adopt Staff's suggestion that the conflict between state and federal law might be avoided by ordering state-law unbundling at a price based on some undefined "cost" standard rather than at the federal "TELRIC" price. MCI does not adopt Staff's position, and more importantly MCI did not adopt Staff's position in its Petition or raise state-law pricing as an issue to be arbitrated. Staff's approach also raises several serious questions because TA '96 does not govern price alone, but access. More to the point for present purposes, Staff's proposal is unworkable, because it would yield an interconnection agreement that would require the provisioning of network elements at undefined prices.

5. The Commission similarly rejects MCI's position that the ICA require unbundling pursuant to Section 271 of TA '96. This is not a proceeding under Section 271, but an arbitration under Sections 251 and 252. The Commission's duty – as set forth in Section 252(b)(4)(c) – is to ensure that the Agreement meets the requirements of Section *251*, not those of Section 271. There is no reference to Section 271 in Section 252, and nothing in Section 252 (or anywhere else in the 1996 Act) authorizes state commissions as arbitrators to enforce Section 271 duties in Section 252 arbitrations. Consequently, as the Seventh Circuit has held, a state commission may not "parlay its limited role in issuing a recommendation under section 271" to impose substantive requirements under the guise of section 271 authority. *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004). Moreover, MCI's arbitration petition did not seek unbundled access under section 271, and the Commission is not free to resolve issues not raised in the petition.

GT&C ISSUE 7: HOW LONG SHOULD THE TERM OF THE AGREEMENT BE?

ICA Reference: General Terms & Conditions § 7.2

SBC proposes a three-year term for the ICA, and MCI proposes a five-year term. Staff supports a three-year term. *See* Staff Init. Br. at 10-11.

FCC Rule 809(c), 47 C.F.R. § 51.809(c), requires ILECs to make interconnection agreement terms and conditions available only for "a reasonable period of time," and this Commission has previously determined that three years is a reasonable period of time given the rapidly changing technology and regulatory environment in the telecommunications industry. In a previous arbitration, we awarded a three-year term, based in part on our recognition that "the telecommunications field is changing so rapidly that contract provisions which are reasonable under the law and circumstances at one point in time may be rendered obsolete, ineffective or

burdensome under the law and circumstances which develop at a later point in time." Docket 00-0332, Arbitration Decision (August 30, 2000), at 12.

MCI argues that a three-year term has proven to be too short, but the three-year term in MCI's current interconnection agreement with SBC has not proven too short. That agreement was entered in 1997 and is obsolete in many respects. And the actual seven-year duration of that nominally "three-year agreement" is illustrative of the fact that interconnection agreements almost invariably remain in place for longer than their nominal term.

Staff recommends a three-year term, and the Commission adopts Staff's recommendation.

GT&C ISSUES 8 & 9: WHAT TERMS AND CONDITIONS SHOULD APPLY TO THE CONTRACT AFTER EXPIRATION, BUT BEFORE A SUCCESSOR ICA HAS BECOME EFFECTIVE?

ICA References: General Terms & Conditions §§ 7.2, 7.7-7.10

SBC proposes provisions to govern the parties' relations after this ICA has expired and before a successor agreement has become effective. With one modification, we adopt SBC's proposed language, because without such language, the parties could find themselves in an uncertain position when the ICA has terminated and they are negotiating a successor agreement. Typically, both parties to an interconnection agreement expect to continue doing business with each other during this period – *i.e.*, to continue their interconnections, payments of intercarrier compensation, leasing of UNEs – but it may be unclear pursuant to what terms and conditions. Should it be the terms and conditions of their terminated interconnection agreement, for example, even though that agreement is no longer in effect?

The language we adopt will minimize such uncertainties, because it spells out how the parties are to proceed after this ICA expires. MCI objects to SBC's proposed language, but does not argue that the ICA should not provide for the scenarios SBC's language addresses. MCI's sole objection is a claim that SBC's language would permit SBC to terminate this agreement after expiration of the initial term even if the parties are pursuing a successor agreement. We find that is not correct, because GT&C Section 7.6 provides that during negotiation of a successor agreement, the parties will continue to perform their obligations under the agreement until the successor agreement becomes effective.

Staff generally endorses SBC's language, but maintains the ICA should remain in effect for no longer than ten months after a notice of termination. SBC does not object to Staff's recommendation. Accordingly, the ICA will include SBC's proposed language, but with a modification providing that the ICA will in no event remain in effect for longer than ten months after a party provides a notice of termination pursuant to the procedures set forth in the ICA.

GT&C ISSUE 10: **WITH THE INSTABILITY OF THE CURRENT TELECOMMUNICATIONS INDUSTRY IS IT REASONABLE FOR SBC ILLINOIS TO REQUIRE A DEPOSIT FROM PARTIES WITH A PROVEN HISTORY OF LATE PAYMENTS?**

ICA Reference: General Terms & Conditions § 9

GT&C Section 9 consists of deposit requirements that SBC states it needs in order to protect itself against the losses it incurs when it provides services to CLECs that fail to pay their bills. Staff recommends that SBC's proposal be adopted, but with one modification, which SBC states is acceptable. We adopts SBC's proposed language, with the modification proposed by Staff, based on our resolution of the parties' disagreements as follows:

SBC proposes a deposit equal to three months' anticipated billings, while MCI proposes one month. SBC explains that the basis for its proposal is that the provisions in the ICA that govern the timing of bills, bill payments, and the handling of unpaid bills are such that if MCI stops paying its bills, MCI could owe SBC as much as two-and-a half months worth of payments before SBC can discontinue providing service to MCI. Consequently, the purpose of the deposit requirement would be defeated if MCI's deposit were only large enough to cover one or two month's unpaid bills. Moreover, MCI's own tariff calls for deposits as large as four months' estimated charges from business customers, and the Illinois Administrative Code likewise contemplates deposits up to four months' estimated charges for business customers. Staff recommends that the amount of the initial deposit be equal to four months' estimated billings, in order to harmonize the two subsections of Section 9, and we accept that recommendation.

The parties disagree about the circumstances under which a deposit will be required. SBC witness Egan described SBC's proposal in detail and explained why each trigger that SBC proposes should be adopted. MCI's principal criticism of SBC's proposal is that it is a "confusing hodgepodge" and is not organized in any coherent fashion. We do not find that to be the case. SBC's proposed subsections 9.2.1, 9.2.2, 9.2.3 and 9.2.4 cogently describe four circumstances in which a deposit would be required, and each of the four is reasonable, in that it is a circumstance in which there would be reason for concern about the CLEC's ability to pay its bills when they come due. Also, we do not believe that the FCC policy statement that MCI cites in support of its opposition to SBC's proposed language indicates otherwise. Apart from the fact that the policy statement did not concern an interconnection agreement, the thrust of the FCC's statement was that subjective deposit triggers can be problematic; the deposit triggers that the FCC was addressing are not the deposit triggers SBC has proposed here, and SBC's proposed triggers are not unduly subjective.

MCI's proposes 6% interest on deposits. As SBC points out, however, that rate is high, given current market conditions, and the appropriate rate is one that will adjust as the market changes. Accordingly, the ICA will provide that deposits will bear interest at the State of Illinois tariff rate as approved by the Commission from time to time.

The parties agree that a deposit should be returned if the party that made the deposit makes timely payments for a specified period, but they disagree on the duration of that period. We find that the period should be twelve months, which reflects a full business cycle.

Finally, we reject MCI's proposed Section 9.7, concerning application of the deposit amount, because it does not clearly state when the party holding the deposit can use it to apply to the past due balances and because it is unnecessarily narrow in that it would allow deposits to be applied only to balances over 120 days past due.

GT&C ISSUE 11: WHAT TERMS AND CONDITIONS SHOULD APPLY IN THE EVENT THE BILLED PARTY DOES NOT EITHER PAY OR DISPUTE ITS MONTHLY CHARGES?

ICA Reference: General Terms & Conditions § 10

This issue concerns SBC's proposed language concerning steps that could be taken if either party fails to pay bills submitted by the other party. SBC's language would permit the Billing Party to send a collection letter to the Non-paying Party when there are past due amounts. This initial collection letter would state that the Non-paying Party must remit all Unpaid Charges to the Billing Party within ten business days. If the Non-paying Party wants to dispute any of the unpaid charges, it must, within ten business days, notify the Billing Party in writing of any disputes, pay all undisputed amounts owing, and pay all disputed amounts into an interest-bearing escrow. Failing that, the Billing Party would send a second letter demanding the unpaid balance be paid within five business days. Upon sending the second collection letter, the Billing Party could suspend acceptance of new orders from the Non-paying Party. And if the Non-Paying Party failed to pay within five business days after the second letter, the Billing Party could disconnect its services if the Unpaid Charges exceeded 5% of the aggregate amount billed by the Billing Party to the Non-paying Party in Illinois during the prior month.

The parties' principal disagreements are (i) whether the Billing Party should be permitted to discontinue service to the Non-Paying Party as a remedy for non-payment; and (ii) whether a discontinuation of service should apply only to the particular service(s) for which payment was not made.

In this arbitration, MCI opposes discontinuation of service as a remedy for unpaid bills. MCI's own Ill. C.C. Tariff No. 2, however, allows MCI to discontinue service to its own customers if they do not pay their bills. This indicates that MCI recognizes that it is correct, as Staff puts it, that the avoidance of potential financial losses is a legitimate business reason for SBC to disconnect service to MCI. And as Staff explained, under MCI's proposal, however, non-payment can lead only to a request for an increase of the existing deposit and a refusal to accept new, or to complete pending orders. We agree with SBC and Staff that there does come a point where a party's failure to pay its bills warrants a discontinuance of service to that party, and that the language proposed by SBC appropriately identifies that point. We therefore adopt SBC's proposal, coupled with MCI's additional alternatives, as Staff recommends.

We also agree with Staff and SBC that if a party fails to pay its undisputed bills, it is appropriate for the Billing Party to discontinue all services to the Non-paying Party, not just the

service(s) for which payment is not made. MCI's proposal would allow the remedies for non-payment to apply only to the particular Billing Account Number(s) for which payment was not made. That is a severe limitation, because there are about 500 different BANs. We agree with SBC that if a Sears customer failed to make payments due for the purchase of a couch, MCI presumably would expect Sears to refuse to sell that customer automotive products on credit, not just other couches. Similarly, if MCI fails to pay SBC's bills for any services – undisputed bills, and bills for which SBC has repeatedly sent MCI collection notices – SBC should be allowed to protect itself by declining to provide services to MCI, not just the particular services in the BAN as those for which MCI failed to pay. Staff agrees.

Accordingly, the parties shall include SBC's proposed GT&C Section 10 in their agreement.

GT&C ISSUE 14: WHICH PARTY'S AUDIT REQUIREMENTS SHOULD BE INCLUDED IN THE AGREEMENT?

ICA Reference: General Terms & Conditions § 13

To ensure that bills are accurate, the parties have agreed, in GT&C § 13, that each party may audit the other. There are, however, several disagreements concerning the audit provisions. The first disagreement concerns the scope of the audits. Under MCI's proposal, the only purpose of the audits would be to ensure that the audited party's bills are accurate; as a result, the only records of the audited party that would be subject to examination would be those that pertain to that party's bills. SBC agrees that a key purpose of the audits is to ensure that the audited party's bills are accurate, but contends that is not the only purpose, because the accuracy of each party's bills depends partly on the accuracy of information provided by the other party. Accordingly, when SBC audits MCI, SBC must be allowed to examine not only the MCI records that underlie MCI's bills, but also the basis of the MCI records that MCI furnishes SBC for use in SBC's billing. SBC's proposed language for Sections 13.2 and 13.4 specifies that audits serve that second purpose. MCI does not contest the proposition that SBC should be allowed to audit the records that MCI provides to SBC for SBC's use in billing MCI. MCI objects, however, that SBC's language is overly broad because it calls for verification of compliance with any and all provisions of the ICA that affect the accuracy of the Auditing Party's bills. We find that MCI's objection is not well taken, for two reasons. First, MCI does not identify any provisions of the ICA that are encompassed by SBC's language and that MCI believes should not be encompassed. Section, there is nothing overly broad about verifying compliance with every provision of the ICA that affects the accuracy of bills.

MCI proposes that there be two audits per year, while SBC proposes that there be one scheduled audit per year, with a follow-up audit permitted if an audit discloses errors in an amount at least five percent of the amounts payable by the auditing party. Audits can take substantial time, and with two audits per year, the notice for one audit might well come just as the previous audit was being completed. We adopt SBC's approach, which we think is considerably strengthened by the inclusion of a follow-up in the event that an audit reveals substantial errors. In this regard, we conclude that the 1½ % error rate that MCI proposes as a threshold is too low.

The appropriate maximum time period to be covered by an audit is the 12 months proposed by SBC. An audit covering the 24 months proposed by MCI would require excessive time and resources to produce the voluminous amount of documentation needed to complete the audit.

SBC proposes that the auditing party's employees be permitted to perform the audits. MCI states it is concerned about the exposure of confidential business information. SBC responds that are ample safeguards against harm resulting from such exposure, including redaction of proprietary information from audited records and confidentiality agreements. To accommodate the parties' differing views on this matter, SBC proposes language that would allow the audited party to insist that the audit be performed by an independent auditor, but that would require the audited party, if it made that choice, to pay one-fourth of the auditor's fees and expenses. We conclude this is a fair arrangement.

SBC's proposed Section 13.3 provides that generally, the auditing party will bear the expense of the audit. Subject to the SBC-proposed carve-out just discussed, that is plainly appropriate. SBC's language then goes on to require the audited party to reimburse one quarter of the auditing party's costs (when the auditing party uses an independent auditor) if the audit discloses problems in the audited party's records that exceed a specified threshold. This is appropriate, because the presence of substantial flaws in the audited party's records will increase the work entailed by, and thus the costs of, the audit.

GT&C ISSUE 18: WHICH PARTY'S INTERVENING LAW CLAUSE SHOULD BE INCLUDED IN THE AGREEMENT?

ICA Reference: General Terms & Conditions § 23

General Terms & Conditions Section 23 will provide for the ICA to be amended in the event of a change in the law on which provisions of the ICA are based. The parties have proposed significantly different language for this section, however.

MCI has articulated two objections to SBC's proposed intervening law clause, and the Commission rejects both objections. First, MCI objects that SBC's proposal would make changes in law effective immediately, with no negotiation between the parties – an arrangement that MCI claims would allow SBC unilaterally to effectuate its own understanding of the change of law. In reality, SBC's proposal works exactly the same way for both parties, and does not allow either party to "unilaterally" do anything. Equally important, MCI ignores the alternative language that SBC has offered (*see* DPL for GT&C 18), which, like MCI's proposal, requires negotiation of a contract amendment before any change in law is given effect. That alternative indisputably moots MCI's first objection.

Second, MCI objects that SBC's proposal, in addition to defining what a change of law event is and specifying what the parties may do when such an event occurs, also states that the parties' rights and obligations as provided in the ICA are in part compelled by current law, and that by agreeing to memorialize those rights and obligations in this contract in conformance with the law as it now stands, neither party is waiving its right to challenge that law. MCI's objection is not that the reservation of rights language is in any way inaccurate or inappropriate, which it

plainly is not, but rather is that the language does not, in MCI's view, belong in the intervening law portion of the ICA. That objection, apart from being overly formalistic, is, to say the least, weak; the connection between SBC's reservation of rights language and language governing how the parties will proceed in the event of a change in law is palpable. SBC's reservation of rights language, the substance of which is evidently not objectionable to MCI, is adopted.

With MCI's two objections disposed of, SBC's proposed intervening law language should be adopted, because it much more clearly and precisely defines the parties' rights in the event of a change of law (and much more completely defines what a change of law is) than MCI's language does, and is thus best calculated to minimize future disputes.

SBC 800 ISSUE 1: NOW THAT USTA II IS OFFICIAL, SHOULD THE AGREEMENT CONTAIN AN 800 APPENDIX AT ALL?

ICA Reference: 800 Appendix (entire)

For the reasons set forth above, the Commission agrees with Staff and SBC that the ICA should not contain an 800 Appendix at all because the *TRO* held that access to the 800 database (and other call-related databases) is only required as an unbundled network element when the CLEC uses SBC's unbundled local switching. *USTA II* vacated the FCC's decision to require unbundling of mass market switching and affirmed the FCC's decision to no longer require unbundling of enterprise switching. Thus, SBC is no longer obligated to provide switching as a UNE and need not provide access to 800 as a UNE.

800 ISSUE 1: SHOULD MCI BE PERMITTED TO COPY, STORE OR MAINTAIN 800 DATABASE INFORMATION OBTAINED FROM SBC?

ICA Reference: 800 Appendix § 3.8

Alternative 1

For the reasons set forth under SBC 800 Issue 1, the Commission finds that the ICA should not contain an 800 Appendix at all, and accordingly this issue is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

Like LIDB and CNAM, the 800 database is a call-related database. And as with LIDB and CNAM, the FCC found in both the *UNE Remand Order* and the *TRO* that CLECs are not impaired without access to the ILEC's 800 database and therefore concluded the 800 database is not a UNE. As with LIDB and CNAM, however, access to the 800 database is provided on an unbundled basis when a CLEC purchases unbundled local switching from SBC. *TRO* ¶ 555.

In the 800 Appendix, SBC provides unbundled access to the 800 database when used in conjunction with its unbundled local switching. SBC proposes language in Section 3.8 to prevent unfettered use of 800 database information. It provides that "MCI shall not use the database information to copy, store, maintain or create any table or database of any kind for any purpose other than routing requirements for originating 800 calls."

The Commission finds that SBC's proposed provision is reasonable because it does not interfere with MCI's proper use of the 800 database access, *i.e.*, access for calls originated by its end users served by SBC's unbundled local switching. Without this language, MCI could retain the data it receives when it accesses the 800 database on a call-by-call basis and could use the data for any purpose without restriction. MCI could use it to market its own services to businesses that have 800 service from MCI's competitors. Alternatively, MCI could capture this information in order to construct a pseudo-800 database of its own, which it could then query instead of the National 800 Database. Neither use of the information would be appropriate.

800 ISSUE 2: SHOULD MCI BE PROHIBITED FROM USING 800 DATABASE INFORMATION OTHER THAN FOR ITS' END USER CUSTOMERS IN SBC ILLINOIS?

ICA Reference: 800 Appendix § 3.10

Alternative 1

The Commission will not reach this issue, because we find there should be no 800 Appendix. *See supra* SBC 800 Issue 1.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed language for Section 3.10 of the 800 Appendix. This language makes clear that MCI's use of the 800 database UNE is only for purposes of providing local services within SBC's operating territory. Since MCI will query the 800 database only on behalf of its end users served by SBC's unbundled local switching, by definition those end users will be located within SBC's operating territory, and by definition MCI will be providing those end users local services. Thus, SBC's language establishes no restriction that would interfere with MCI's legitimate use of 800 database access.

In addition, Section 3.10 makes clear that any other access to the 800 database is pursuant to SBC's tariffs. SBC has effective tariffs for 800 database access at both the state and federal level. *See, e.g.*, Ill. C. C. Tariff No. 21, § 6.4. These tariffs provide access on just and reasonable rates, terms and conditions. If MCI wants 800 database access from SBC when it is not using SBC's unbundled switching, it must order it from the tariff.

We find that MCI's arguments on this issue are without merit. First, MCI asserts that 800 database access is only available from SBC. That is not the case. The 800 database is a national database which is replicated in approximately 20 locations across the country. Moreover, many carriers, including MCI, are allowed to access the administrative portion of the database to reserve 800 numbers and to load routing instructions for their customers. Next, MCI argues that the 800 database access should be available under the dialing parity provisions of Section 251(b)(3). There is no support for that argument. The language of Section 251(b)(3) does not apply to 800 database access. Finally, MCI objects to SBC's tariff on the grounds that it contains market based pricing. We disagree. The rates in SBC's federal access tariffs comply with the FCC's just and reasonable standard. These rates were subjected to intense scrutiny in the tariff phase of Docket 86-10 and there is no basis for MCI's assertion that they constitute anything other than FCC-approved rates.

800 ISSUE 3: **UNDER WHAT CIRCUMSTANCES SHOULD SBC BE REQUIRED TO PROVIDE MCI WITH ACCESS TO ITS 800 DATABASE?**

ICA Reference: 800 Appendix §§ 3.2, 4.2

Alternative 1

The Commission will not reach this issue, because we find there should be no 800 Appendix. *See supra* SBC 800 Issue 1.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed language for Sections 3.2 and 4.2 of the 800 Appendix. Section 3.2 states that SBC provides access to 800 database as a UNE only when MCI is using SBC's unbundled local switching. This is the same issue as discussed in 800 Issue 2 above and, for the same reasons set forth therein, we resolve this issue in SBC's favor.

Section 4.2 involves a rate issue and relates to Pricing Issue 22. There, MCI argues that TELRIC rates for 800 database access should be included in the Price Schedule (lines 436-422). We disagree. These rates should not be included in the Price Schedule because there are no extra charges when an MCI end user served by SBC's unbundled local switching makes an 800 call that causes SBC to query the 800 database. Since MCI's access to 800 database as a UNE (at TELRIC) is limited to that situation, there is no need for rates in the ICA at all.

SBC's language in Section 4.2 states that rates for 800 database access are in the applicable Commission ordered tariff where stated. This language is accurate and complete. When MCI orders unbundled switching, it gets no separate charge for 800 database access, so nothing needs to be in the Price Schedule. When MCI orders 800 database access in any other situation, it is ordering under the tariff so the tariff rates apply. We adopt SBC's proposed language in Section 4.2 and reject MCI's.

SBC CNAM ISSUE 1: **NOW THAT USTA II IS OFFICIAL, SHOULD THE AGREEMENT CONTAIN A CNAM APPENDIX AT ALL?**

ICA Reference: Entire CNAM Appendix

For the reasons set forth above, the ICA should not contain a CNAM Appendix at all because the *TRO* held that access to CNAM (and other call-related databases) is required only when the CLEC uses the ILEC's unbundled local switching. *USTA II* vacated the FCC's decision to require unbundling of mass market switching and affirmed the FCC's decision to no longer require unbundling of enterprise switching. Thus, the Commission agrees that SBC is no longer obligated to provide switching as a UNE and need not provide access to CNAM.

CNAM ISSUE 1: **SHOULD SBC BE REQUIRED TO PROVIDE BULK ACCESS TO CNAM DATABASE IN ADDITION TO QUERY ACCESS?**

ICA Reference: CNAM § 3 *et seq.*

Alternative 1

In our resolution of CNAM Issue SBC 1, we determined that the ICA would include no CNAM Appendix. That determination moots the remaining CNAM Issues.

Alternative 2 (If Alternative 1 Not Adopted)

A Calling Name ("CNAM") Database associates each end user with a distinctive alpha-numeric string, and is used to provide end users with services such as caller ID with name. SBC has a CNAM Database, as do many other entities, including other telecommunications carriers and such third party providers as Targus, Accudata and Illuminet. These providers have created national CNAM databases using directory assistance ("DAL") information as their source data. If MCI does not have a CNAM database, it can create one in the same way, by reformatting DAL information that is available to it. MCI has access to SBC's CNAM database on a "per query" basis (where the database is queried in connection with the completion of calls on a call-by-call basis) when MCI uses SBC's unbundled local switching. The question presented here is whether the Commission should require SBC to give MCI "bulk access" to its CNAM Database, *i.e*¸ furnish the entire Database to MCI in bulk, rather than on a per query basis.

In previous proceedings, but not in this one, MCI contended that Section 251(c)(3) of the 1996 Act entitled it to bulk access the CNAM Database. The overwhelming majority of states in which MCI pressed this claim rejected it, as did the FCC's Wireline Competition Bureau in *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, DA 02-1731* (rel. July 17, 2002), where it ruled that "neither the [1996]Act nor the [FCC's] rules support WorldCom's request for "batch" access to Verizon's CNAM database."

Now, MCI contends that Section 251(b)(3), rather than Section 251(c)(3), entitles it to bulk access the CNAM Database. We conclude it does not. Section 251(b)(3) does not apply to the CNAM database. It imposes on local exchange carriers "the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have non-discriminatory access to telephone numbers, operator services, directory assistance and directory listings with no unreasonable dialing delays." Thus, by its plain terms, Section 251(b)(3) is limited to telephone numbers, operator services, directory assistance and directory listings, not the CNAM database. MCI asserts that because CNAM has something to do with dialing, it falls within Section 251(b)(3), but that is not the case. CNAM is not part of the dialing process. As the undisputed evidence shows, the database has nothing do with the way a call is dialed. In fact, a CNAM database query cannot even be launched until after the end user's number has been dialed. In short, 251(b)(3) imposes no duty relating to CNAM, let alone a duty to provide bulk downloads of the CNAM database.

Moreover, even if Section 251(b)(3) did apply to the CNAM database, its non-discrimination requirement would not entitle MCI to bulk download the database. MCI claims it is "discriminatory" to require it to access SBC's CNAM database on a "per query" basis because it is forced to pay for two sets of SS7 facilities – one to SBC and another to its own database. That is incorrect, because (1) MCI has already established SS7 connections to SBC to provide ordinary signaling, and these are the same SS7 facilities that MCI uses to access CNAM on a per query basis; and (2) all carriers, including SBC, routinely query the databases of other carriers for CNAM information**,** so MCI cannot be correct that the mere need to issue a query is "discriminatory."

MCI also argues that when it accesses SBC's CNAM on a per query basis, it must pay for the same caller ID information each and every time a call is made. This may be true, but it does not constitute "discriminatory access."

Finally, MCI's assertion that, without bulk access to SBC's CNAM information, it will not be able to develop "innovative service offerings" is belied by the fact that MCI already has its own CNAM database and can create such "innovative service offerings" if it desires.

CNAM ISSUE 2: SHOULD SBC BE REQUIRED TO PROVIDE MCI WITH ACCESS TO CNAM AS AN UNBUNDLED NETWORK ELEMENT, OTHER THAN AS PART OF UNBUNDLED LOCAL SWITCHING?

ICA References: CNAM §§ 3, 4.1, 4.3.1, 4.12

There are two sub-issues in CNAM Issue 2, each of which is discussed below.

Access to CNAM on a non-UNE basis: The Commission adopts SBC's proposed language for Section 4.3.1 of the CNAM Appendix. In Section 4.3.1, SBC proposes language to make clear that any access to its CNAM database other than access provided in conjunction with unbundled local switching, will be pursuant to the terms and conditions of SBC's tariff. This is consistent with the *TRO*, which found that carriers that deploy their own switches are not impaired without access to the ILEC's CNAM database on a UNE basis. *TRO* ¶ 551. MCI does not contend otherwise.

Technical Standards for Queries, Administration and Storage of CNAM Data: The Commission adopts SBC's proposed language for Section 4.12 of the CNAM appendix. SBC's proposed language provides that per query access to the CNAM database must conform with the proper protocols as set forth by GR-1188-CORE, GR-1158-CORE, and GR-446-CORE, all of which outline the technical, industry-wide standards for querying, administering, and storing CNAM data in the CNAM database. These documents are generic requirements written by Telcordia Technologies to standardize industry practices so that vendors and carriers can deploy equipment and services in compliance with industry standards. GR-1188-CORE specifically deals with the generic requirements for Calling Name delivery. GR-1158-CORE provides a data catalog or dictionary of LIDB data elements. GR-446-CORE discusses the interface between LIDB and its administrative system.

MCI opposes this language, but does not offer any reason. Presumably, MCI objects because the language refers to CNAM access on a per query basis and MCI only wants a bulk download. Because we resolved CNAM Issue 1 in SBC's favor, we also resolve this issue in SBC's favor.

CNAM ISSUE 3: IF BULK DOWNLOADS ARE REQUIRED, SHOULD PROCESSES BE DELINEATED IN THE INTERCONNECTION AGREEMENT?

ICA References: CNAM §§ 3.8, 4.10, 4.11, 5.2, 6.2 (All)

Alternative 1

In our resolution of CNAM Issue SBC 1, we determined that the ICA would include no CNAM Appendix. That determination moots this.

Alternative 2 (If Alternative 1 Not Adopted)

CNAM Issue 3 involves a dispute over how a requirement to provide bulk downloads would be implemented. Our determination in CNAM Issue 1 that bulk downloads will not be required moots this issue.

Alternative 3 (If neither Alternative 1 Nor 2 Adopted)

CNAM Issue 3 involves MCI-proposed language concerning how a requirement to provide bulk downloads would be implemented. MCI proposes a number of requirements, but makes only passing reference to this issue in its testimony, and provides no testimony in support of its proposals.

We agree with SBC that MCI's proposals are not (or have not been shown to be) reasonable. To begin, MCI proposes that an electronic download of the CNAM database no later than thirty (30) days after MCI's request. MCI, as the proponent of the 30-day period, bore the burden to show that its proposed 3-day period is reasonable. MCI offered no testimony to that effect, so we have no alternative but to reject MCI's proposal.

In Section 4.10, MCI proposes that SBC be required to provide "daily updates to the CNAM database information via electronic transfer." SBC objects to updates on a daily basis, but not for the reasons one might suppose. SBC states that it updates its CNAM database more than once a day, which would mean that acceptance of MCI's proposal would mean that queries to MCI's database would not yield the most up-to-date information. Users of the public switched network, including SBC's customers, would not be well-served by this arrangement.

In Section 4.11, MCI proposes that SBC provide a "complete refresh of the CNAM database" at no charge if MCI can show that 500 or more records in the database are "corrupt." This is not a reasonable proposal, because records in the database can become "corrupt" through no fault of SBC, *e.g.*, through misuse by MCI. SBC should not be required to provide a free refresh when it is not responsible for the corrupt condition of MCI's data.

Finally, MCI proposes a specific electronic data transfer medium that SBC states is not acceptable to SBC, and proposes data processing requirements that are new to SBC and that SBC's systems cannot support. Once again, we cannot impose MCI's proposed language on SBC with MCI having submitted no evidence to show why these requirements are reasonable

CNAM ISSUE 4: WHAT TERMS AND CONDITIONS SHOULD GOVERN ACCESS TO ALL ACCOUNT OWNER INFORMATION?

ICA References: CNAM §§ 4.18 and 4.19

The Commission adopts SBC's proposed language for Sections 4.18 and 4.18 of the CNAM Appendix. The CNAM database is populated with the data of Account Owners' end users (an Account Owner is simply a carrier whose end user information is stored in SBC's CNAM database) and is accessed by carriers (in this case, MCI) for the provision of calling name service. In the event an Account Owner's end user has a question or complaint regarding the use of its CNAM information, the end user will contact the Account Owner. The Account Owner needs to be able to question MCI regarding how its information is being used, since only MCI will have the answer. As the CNAM database provider, SBC should not be in the middle of this discussion between the Account Owner and MCI. Since the Account Owner likely has no contractual relationship with MCI, SBC proposes language in Sections 4.18 and 4.19 that establishes a communication process between Account Owners and MCI to resolve any issues that may arise. This language requires that, upon request from an Account Owner, MCI will identify for the Account Owner how MCI is using the Account Owner's information. Ultimately, this is an issue concerning the proper use of end user information and the protection of end user privacy.

MCI argues that SBC's concerns can be addressed by recognizing that MCI is entitled to nondiscriminatory access. We disagree. Providing a communications process between Account Owners and MCI to discuss MCI's use of the Account Owner's data has nothing to do with nondiscriminatory access. SBC's language provides reasonable protection to Account Owners, imposes no undue burden on MCI and keeps SBC out of the exchange of information between MCI and Account Owners. This language is commercially reasonable and is adopted.

CNAM ISSUE 5: IS IT NECESSARY TO INCLUDE THE LANGUAGE IN SECTION 4.16 ABOUT THE ACCURACY OF CNAM QUERIES?

ICA Reference: CNAM § 4.16

The Commission adopts SBC's proposed language for Section 4.16 of the CNAM Appendix. SBC proposes Section 4.16 to make clear that the CNAM database is frequently updated through the course of the day and that the CNAM data that is returned in response to an MCI query may differ as the database is updated. MCI objects to this language, but has not proposed language of its own. CNAM data is continuously updated as SBC and CLECs add, delete or modify customer accounts in the CNAM database over the course of a workweek. Changes are not instantaneous, however. Consequently, a query to the CNAM database will only obtain the end user information contained in the CNAM database at the time the query is

made. Thus, the accuracy of the information in the CNAM database is dependent upon the timing of the query. That is all SBC's proposed Section 4.16 states, and MCI does not dispute that Section 4.16 is accurate.

MCI objects to SBC's proposed language only on the basis that MCI will not query SBC's CNAM database. That is incorrect. CNAM queries will be launched on behalf of MCI's end users that are served by SBC's switches. MCI does not dispute that the operational reality set forth in Section 4.16 is true. Indeed, MCI has already agreed to language in Section 3.21 of the LIDB Appendix that reflects this fact.

CNAM ISSUE 6: MAY SBC BLOCK ACCESS TO CNAM IN THE EVENT OF MISUSE?

ICA Reference: CNAM § 4.20

The Commission adopts SBC's proposed language for Section 4.20 of the CNAM Appendix, which restricts MCI's access to CNAM data in the event it uses that data for unauthorized purposes. If the misuse continues following written notice from SBC, SBC may terminate the CNAM Appendix upon ten (10) days written notice.

We find that SBC's proposed language is necessary because SBC is providing MCI with end user information, including customer name, telephone number and privacy indicator. Like any end user information, it is subject to misuse. For example, this information – which includes non-published numbers – could be used to solicit new customers in a telemarketing campaign or could be sold improperly to a third party that might use the information for marketing purposes. We are not suggesting that MCI is likely to engage in these activities, but inclusion of SBC's proposed language ensures that remedies are available in the event these activities do occur. SBC's proposed language secures a commercially reasonable means to quickly end impermissible use of data so that the privacy interests of its end users will be respected. In addition, SBC's proposed language properly protects it from potential liability as the provider of such data should an incident take place.

We further find that SBC's language is commercially reasonable because it provides a measured response to misuse. In the first instance, SBC is entitled only to block access to the CNAM database. Thereafter, it must provide written notice of such misuse. If the misuse continues, then upon ten (10) days written notice SBC may terminate the CNAM Appendix altogether.

MCI complains that this language gives "too much leverage" to SBC to determine what is and what is not an appropriate use. We disagree. MCI overlooks the fact that any determination SBC makes under Section 4.20 will be subject to the dispute resolution provisions of the ICA, including Commission review. Accordingly, SBC would have every incentive to use this provision with great caution and only where end user interests are being jeopardized. MCI's suggestion that there should be no streamlined process to address abuse of customer information is not reasonable and is rejected. Instead, the Commission adopts SBC's proposed language for Section 4.20.

CNAM ISSUE 7: FOR WHAT PURPOSES MAY MCI USE CNAM INFORMATION ?

ICA Reference: CNAM § 7.1

SBC proposes language in Section 7.1 that would reasonably limit MCI's use of CNAM data: **Unless expressly authorized in writing by the Parties, MCI will not use CNAM Service for purposes other than those described in this Appendix. MCI may use CNAM Service for such authorized purposes only on a call-by-call basis.**

MCI objects to this language and proposes the following: ***MCI may use the CNAM information provided pursuant to this Appendix to provide services to its end user customers consistent with state and federal law. MCI further agrees not to use the CNAM information for any marketing purposes.***

The Commission adopts SBC's proposal, because access to the CNAM database under the ICA is appropriate only when used in conjunction with SBC's unbundled local switching. In this situation, queries to the CNAM database on behalf of MCI's end users are done on a "call-by-call basis" and are performed only to provide local exchange services to MCI customers served by an SBC switch (and therefore residing within SBC operating territory).

MCI, on the other hand, maintains it is entitled to a download of the CNAM database and that it can use the database for any purpose not prevented by law. We disagree. MCI's position ignores Section 251(c)(3) which authorizes the use of UNEs only for the provision of a telecommunication service. MCI's position also ignores reasonable distinctions between its local and long distance operations. Under MCI's theory, nothing prevents it from obtaining a CNAM download under the guise of local competition and using that database in the provision of nationwide long distance services. Similarly, under MCI's proposal, nothing would prevent it from using SBC's CNAM information to serve customers located anywhere in the nation. Clearly, this would have nothing to do with local competition in Illinois. Accordingly, we reject MCI's proposed language and adopt SBC's.

CNAM ISSUES 8 & 9: WHAT FORECASTING REQUIREMENTS FOR CNAM SHOULD BE INCLUDED IN THIS AGREEMENT?

ICA References: CNAM §§ 8.1, 8.3, 8.4

There are three disagreements here, each relating to a separate section under the "Provisioning" heading of the CNAM Appendix:

Network Overload Conditions (Section 8.1): The Commission adopts SBC's proposed language, which simply acknowledges that the CNAM database and the SS7 network that enables queries to get to the CNAM database can overload if there are an extraordinary volume of queries. To prevent network failure, SBC needs the ability to implement network controls. SBC's language requires it to implement any such controls on a nondiscriminatory basis, so we find that language is not objectionable. MCI does not explain its objection to this prudent and necessary operational provision, but says only that it is not acceptable because it addresses "per query" access. We find that is no basis to reject SBC's language. As we determined in CNAM

Issues 1 and 3, MCI is not entitled to bulk downloads of the CNAM database. But regardless of the outcome of the "bulk download" dispute, the ICA will still address per query access for any use that MCI might make of SBC's unbundled local switching. Because SBC's language deals with an operational issue in a reasonable, nondiscriminatory fashion, and because it merely sets out in words what SBC network technicians would be required by good management practices to do in any event, the Commission adopts that language.

Technical Requirements For Formatting(Queries (Section 8.3): The Commission adopts SBC's proposed language, which addresses the technical requirements for formatting a query to SBC's CNAM database. Many different types of queries originate from a Service Platform, (such as an end office) to the STP. These include queries for CNAM, LIDB, 800 and AIN. The STP evaluates the Translation Type and the SubSystem Number parameters contained in those queries to determine which type query it is so that it can route the query to the appropriate database. As a matter of network operation, the proper Translation Type and the SubSystem Number must be specified for CNAM before a CNAM query can take place. If a carrier were to send SBC a Translation Type and SubSystem Number that SBC does not designate for CNAM queries, then the query might be misrouted to an incorrect database, or more likely would fail altogether.

Forecasts Of CNAM Usage (Section 8.4): The Commission adopts SBC's proposed language, which calls for MCI to provide annual forecasts of its query volumes and to provide special forecasts if MCI's query volume will significantly change. SBC needs usage forecast information to efficiently manage the planning efforts of its network. Such planning efforts benefit not only SBC and the customers it serves, but all carriers that use SBC's unbundled local switching or that interconnect with SBC on a facilities basis. SBC takes the CLECs' busiest hourly query rate and adds it to SBC's own busiest hourly query rate. This allows SBC to determine if its databases have enough processing capability. If not, SBC may need to add resources. This greatly assists SBC in providing the best possible service to both SBC and CLEC customers without undue waste of resources.

CNAM ISSUE 10: SHOULD MCI BE REQUIRED TO MAKE ITS LIDB INFORMATION AVAILABLE TO SBC THROUGH A SEPARATE AGREEMENT?

ICA Reference: CNAM § 10.1

The Commission adopts SBC's proposed language for Section 10.1 of the CNAM Appendix. SBC's language is identical to that agreed to by MCI in Section 11.1 in the LIDB Appendix. Due to an apparent clerical error, SBC's proposed language in the CNAM Appendix refers to "line record information" when it should refer to "CNAM information." With this correction, SBC's proposed language simply establishes the principle of mutuality and states that MCI will make its CNAM information available to SBC on a reciprocal basis.

There are two aspects to Section 10.1. First, MCI should make its CNAM information available to SBC, either by providing that information directly to SBC or, in instances where MCI stores its CNAM information in the database of the third party, through a separate agreement between SBC and that third party. Second, if SBC is unable to reach such an

agreement with the third party, MCI acknowledges that any end user served by SBC's switch or service platform will not have access to MCI's CNAM information. We find this an appropriate statement of how the network will operate if SBC cannot access MCI's CNAM information.

We find that SBC's mutuality clause fairly establishes reciprocal obligations so that SBC is entitled to obtain the same access to MCI's CNAM information as MCI has to CNAM information of SBC, on the same terms and conditions. This is in the public interest because it expands the availability of CNAM information that SBC can use to provide caller ID with name services to its end users.

CNAM ISSUE 11: SHOULD THE COMMISSION ADOPT SBC'S LIABILITY AND INDEMNITY LANGUAGE FOR CNAM IN ADDITION TO THAT CONTAINED IN GTC?

ICA Reference: CNAM § 9.6

Alternative 1 (If The Commission Resolves SBC CNAM Issue 1 In SBC's Favor)

In light of our resolution of SBC CNAM Issue 1, this issue is moot.

Alternative 2 (If The Commission Resolves SBC CNAM Issue I In Favor of MCI)

Section 9 establishes a special limitation of liability provision for CNAM, and the parties have agreed to most of the language in this section. The only disagreement involves Section 9.6, in which SBC proposes a limitation of liability and indemnification in the situation where MCI fails to abide by the calling party's desire to block (or unblock) delivery of its calling name information. SBC argues that it should not be responsible if MCI fails to follow the instruction of an end user to withhold (or "block") its calling name information when it places a phone call to others. The Commission agrees.

In such case, SBC has done nothing wrong. To the contrary, it is MCI that has made an error by failing to "block" the information that the caller took steps to block. It is MCI, not SBC, that queries the CNAM database before terminating a call to its end user. It is MCI, not SBC, that decides whether caller ID with name information should be passed along to that end user. Thus, we reject MCI's argument that SBC's language would make MCI liable in circumstances where there is no underlying fault on MCI's part. We also reject MCI's argument that there is no need to have a separate limitation of liability section in the CNAM Appendix. MCI has already agreed to the vast majority of language in this section so it has waived any objection to a separate section.

COLLOCATION ISSUE 2: SHOULD MCI HAVE A FASTER AUGMENT INTERVAL FOR DSO'S THAN IS OFFERED TO OTHER ILLINOIS CLECS?

ICA Reference: Collocation § 2

SBC proposes 60 days as the augment interval for DSOs, consistent with SBC's Illinois collocation tariff. MCI proposes 30 or 45 days, depending on the number of pairs. We agree

with SBC that MCI's proposal for special treatment at variance with the terms that apply to other CLECs in Illinois should be rejected.

MCI has agreed, with this one exception, that the rates, terms and conditions for collocation in the ICA will be the same as the rates, terms and conditions in SBC's collocation tariff. In this one instance, the augment interval for provisioning DSOs, however, MCI asks the Commission to require SBC to provision DSOs in less time than is provided for in the collocation tariff. We see no reason why the same interval should not apply to all CLECs in Illinois. Moreover, the 60-day interval in the tariff was approved by this Commission, based in part on input from the CLEC community.

The record in this proceeding does not warrant the deviation from the tariffed interval that MCI proposes. MCI asserts that the need for additional capacity can arise very quickly, but that is no more true for MCI than it is for other CLECs. SBC Ex. 7.0 MCI also complains that it must rely on forecasts from Internet Service Providers to estimate demand, but again, MCI is not unique in that regard. In addition, MCI says nothing about what relationship (if any) its proposed intervals have to the time it does take or should take to actually do the work in question.

DA ISSUE 1: SHOULD SBC ILLINOIS BE REQUIRED TO PROVIDE DA AS A UNE?

ICA Reference: Directory Assistance § 3.2

Alternative 1

The parties disagree on whether the Directory Assistance ("DA") and Operator Services ("OS") appendices should state that DA and OS are UNEs. MCI proposes such a statement to lock in a TELRIC rate, while SBC opposes its inclusion. SBC's obligation to provide OS/DA to MCI is a corollary to its obligation to provide unbundled local switching. As we explained above, federal law precludes the inclusion of any terms and conditions for unbundled switching, or any corollary service, in this ICA. Accordingly, we find that the DA and OS appendices must be deleted in their entirety, and DA Issue 1 and OS Issue 1 are dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The parties disagree on whether the Directory Assistance ("DA") and Operator Services ("OS") appendices should state that DA and OS are UNEs. MCI proposes such a statement to lock in a TELRIC rate, while SBC opposes its inclusion.

We conclude that DA and OS are not UNEs within the meaning of Section 251(c)(3) of the 1996 Act. MCI appears to concede, in its brief, that DA and OS are not UNEs. While admitting that certain UNE issues have been effectively settled, MCI states that DA Issue 1 and OS Issue 1 are not moot because they are "not 'UNE' issues per se."

Moreover, under long-standing FCC precedent, an ILEC such as SBC is required to offer OS/DA at TELRIC rates only as long as the CLEC is not able to route its OS/DA traffic off of the SBC network. *See UNE Remand Order* ¶¶ 447-464; *TRO* ¶ 560. This Commission similarly

recognized that SBC is obligated to offer OS/DA at TELRIC rates only "until such time as [SBC] successfully demonstrates, after testing and our approval of terms, that CLECs have the ability to route their OS and DA traffic to their own OS and DA platforms or to those of a third party provider." Order, *Investigation into the Compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated*, Docket No. 98-0396 at 95 (Oct. 16, 2001). As a result, if SBC offers customized routing, it no longer needs to provide OS/DA at TELRIC rates – a proposition with which MCI agrees. SBC has demonstrated to our satisfaction in connection with UNE Issues 56 and 57 that it offers customized routing. As a result, the TELRIC pricing regime, and UNE status, are not appropriate for OS/DA.

MCI contends that even if SBC offers customized routing, OS/DA should still be priced at TELRIC rates because no competitive market for the services exists. We disagree. The FCC found at least twice that a competitive market exists for OS and DA. *See UNE Remand Order* ¶ 447; *TRO* ¶ 560. This Commission similarly found that the market for OS is competitive in Illinois. Arbitration Decision, *TDS Metrocom, Inc. Petition for Arbitration*, Docket No. 01-0338, p. 60 (Aug. 8, 2001).

Finally, the declaration of UNE status that MCI seeks here is beside the point because it has no operational effect. The parties otherwise agree on all the details surrounding OS/DA provisioning set forth in the OS and DA appendices except for the language at issue here. And Pricing Issue 30 squarely raises the issue of whether TELRIC rates should apply to OS/DA. MCI's efforts here appear aimed at delaying the advent of market-based pricing for OS/DA by the inclusion of language that declares OS and DA to be UNEs contract language now, so that MCI can insist that the change of law process is necessary to remove that language later. The Commission adopts SBC's proposed language on these issues.

DEFINITIONS ISSUE 2: SHOULD IXCS, COMPETITIVE ACCESS PROVIDERS (CAPS) AND WIRELESS CARRIERS (CMRS PROVIDERS) BE INCLUDED IN THE DEFINITION OF AN END USER CUSTOMER?

ICA Reference: Appendix Definitions – "End User Customer"

The answer to the question posed by Definitions Issue 2 is virtually undisputed: No. The FCC defines "end user" as "[a]ny customer of an interstate or foreign telecommunications service *that is not a carrier*." 47 C.F.R. § 69.2 (emphasis added). Similarly, Section 13-217 of the Illinois PUA defines "end user" as an entity that obtains telecommunications services "for its own consumption and not for resale," and its exhaustive list of end users does not include carriers. Moreover, MCI has agreed to language in Section 4.5 of the Resale Appendix that precludes MCI for using resale to provide access services to IXCs, competitive access providers, and wireless carriers.

MCI's objection here indicates its intent to use UNEs as a tool for arbitrage profits. Under MCI's view, MCI could lease SBC's facilities at low TELRIC rates to provide access services to a carrier, rather than to an end user; the carrier would obtain access service over SBC's facilities but evade the access charges that apply to those facilities; and it would share the windfall with MCI. The Commission finds that the 1996 Act was not enacted to facilitate such

gaming. Section 251(c)(3) limits the scope of an incumbent's duty to provide unbundled access to UNEs that are used "for the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). A "telecommunications service" is in turn defined as "the offering of telecommunications for a fee *directly to the public* or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(51) (emphasis added).

DEFINITIONS ISSUE 4: WHICH PARTY'S PROPOSED DEFINITION OF "LAWFUL" AND "LAWFUL UNE" SHOULD BE INCLUDED IN THE AGREEMENT?

ICA References: UNE §§ 1.1, 1.1.1, 1.1.2, 6 (Intro), 7.11, 7.12, 13.1.1, 22.1.1; xDSL § 1.1; Definitions – "Lawful"

This issue concerns the definition of "Lawful UNE" a term that is also addressed under UNE Issue 11. SBC's definition tracks Sections 251 and 252 of the 1996 Act, and it defines "Lawful UNE" as one required by Section 251(c)(3) of the Act as determined by FCC orders or by state orders that are "not inconsistent with" federal law (47 U.S.C. § 261(c)). MCI's definition merely refers to "Applicable Law," a term that simply begs another definition that vaguely incorporates *all* orders, regulations, permits, and the like.

In its Initial Brief, MCI argued that the Commission should not adopt *any* definition for Lawful UNE, and should instead delete the term as it did in the XO arbitration. But there is a critical difference here: unlike XO, MCI did not object to the term, but instead proposed its own definition. The only question properly before the Commission is *which* party's definition should be accepted, and the Commission answers that question by adopting the definition proposed by SBC.

INVOICING ISSUE 1: WHICH PARTY'S PROPOSAL FOR RECORDING RECIPROCAL COMPENSATION USAGE SHOULD BE INCLUDED IN THE AGREEMENT?

ICA References: Invoicing §§ 4.1-4.4

SBC proposes language addressing how the parties will generate reciprocal compensation bills and how they will transmit information to each other. MCI proposes simply to cross-reference other sections of the agreement. We adopt SBC's proposed language for Sections 4.1 through 4.4 of the Invoicing Appendix.

The parties bill each other substantial amounts for reciprocal compensation, so it is important that they bill each other through an accurate and detailed exchange of switch recordings. SBC proposes terms governing the exchange of switch recordings and the recordation of minutes of use, specifically for purposes of reciprocal compensation billing, rather than reliance on provisions in other appendices that do not relate specifically to reciprocal compensation.

MCI appears to have no substantive opposition to SBC's proposal, but argues that the provisions it wants to reference in the Recording Appendix are traditional and that it is

unnecessary and unwise to repeat the same terms in the Appendix Invoicing that are dealt with in another appendix. MCI also asserts that including SBC's language would violate basic principles of contract construction and add ambiguity. We disagree.

MCI argues that SBC should be precluded from raising this issue in the Invoicing Appendix because it should not be allowed to unilaterally amend a previously agreed-upon provision (§ 3.7) in the Reciprocal Compensation Appendix. This argument appears to be based on the premise that each individual portion of the Agreement that was not disputed during the parties' negotiations somehow became a binding contractual commitment, even though the parties did not arrive at a complete agreement. That is not true. Quite the contrary, until there is a complete agreement, there is no legally enforceable promise. In any event, the purportedly improper amendment that MCI decries consists of combining two sentences into one.

Because SBC's proposal reflects a commercially reasonable approach to a matter that affects both parties, and because MCI has identified no substantive objection to SBC's proposal, we rule in favor of SBC here.

INVOICING ISSUE 2: IF A PARTY DISPUTES A RECIPROCAL COMPENSATION BILL, SHOULD THAT PARTY BE REQUIRED TO PLACE THE DISPUTED AMOUNT IN ESCROW?

ICA References: Invoicing §§ 4.5 *et seq.*, 4.6

SBC proposes language that would require a party disputing a bill for reciprocal compensation to place the disputed amount in escrow. MCI opposes the escrow requirement and thus proposes that there be no language on the topic.

SBC proposes that disputes about reciprocal compensation billing be subject to an escrow requirement because of the size and complexity of such billing. SBC's proposal is even-handed because it applies to both parties and because SBC is as likely to dispute reciprocal compensation billing as MCI is.

We find that MCI's concerns raised in opposition to SBC's language are without merit. First, MCI suggests that only it would be subject to the escrow requirement. As noted above, that is not the case. Second, MCI states that the Commission should reject the escrow requirement as contrary to the parties' historical practice. But MCI has not identified – nor can we identify – any way in which MCI would be harmed if the practice were changed. Finally, MCI contends the Commission should follow its decision in the TDS arbitration and reject the escrow requirement. We find that the TDS decision is not dispositive because the escrow provision at issue here applies only to one category of billing and the parties are equally likely to have disputes about that billing.

We find that the escrow requirement is commercially reasonable, given its mutuality and the special nature of reciprocal compensation billing. The Commission therefore rules in favor of SBC.

INVOICING ISSUE 3: WHEN A PARTY DISPUTES A BILL, HOW QUICKLY SHOULD THAT PARTY BE REQUIRED TO PROVIDE THE OTHER PARTY ALL INFORMATION RELATED TO THAT DISPUTE?

ICA References: Invoicing §§ 6.2, 7.6

SBC proposes that a party have 30 days from the date a dispute is opened (or a backbill is submitted) to provide all supporting information regarding the dispute (or backbill), while MCI proposes that a party have 90 days after opening a dispute to provide this information. We resolve this issue in favor of SBC. In reaching our conclusion, we are mindful of two matters. First, a party submitting a dispute actually has 30 days more than the 30- or 90-day period at issue here to compile information regarding the dispute, because the billed party initially has 30 days from the bill date to provide notice that it is disputing the bill, and it can collect information during that initial period. As a result, a party would have 120 days under MCI's proposal, and 60 days under SBC's proposal, to submit information in support of a dispute. Second, because this provision applies to all types of billing, including reciprocal compensation billing, SBC as well as MCI may be submitting disputes.

We find that SBC's proposal is preferable to MCI's proposal for several reasons. First, prompt resolution of billing disputes is beneficial for both parties and if SBC is willing to commit the resources necessary to address billing issues within the period it proposes, it is reasonable for MCI to do the same. Second, the parties' decision not to adopt a "pay-and-dispute" regime for reciprocal compensation billing means that the billing party could go unpaid for a long time while a dispute is pending about reciprocal compensation billing. Given the size of such billings, the unpaid disputed amount could be substantial. SBC's shorter deadline gives the parties an incentive to resolve the dispute quickly. Finally, MCI already has agreed in Section 6.7 to provide additional information about a dispute, if SBC requests such information, within 30 days.

INVOICING ISSUE 4: SHOULD THE STAKE DATES APPLY EQUALLY TO CREDITS FOR DISPUTED AMOUNTS AS THEY DO FOR THE FILING OF CLAIMS?

ICA Reference: Invoicing § 6.2

SBC proposes that credits resulting from a dispute be applied consistent with the "stake date" mechanism in the Invoicing Appendix. MCI opposes this language and proposes language that does not address the application of credits. We adopt SBC's proposed language.

The stake dates limit how far back the parties can process and dispute past intercarrier billing. In essence, they cut off billing disputes or backbilling as of a certain date, even if the party otherwise could legally recover for a longer period. SBC proposes that Section 6.2, which deals with billing claims, contain a specific reference to the stake dates for such claims set forth in Sections 6.3 - 6.5. This would make Section 6.2 consistent with Section 7.1, which deals with backbilling and which requires that any backbilling comply with the stake dates for backbilling set forth in Sections 7.2 - 7.4. We find that such consistency is commercially reasonable.

Moreover, SBC's proposal simply repeats an agreed sentence in Section 2.8 of the Appendix, which provides a general description of the credit process.

INVOICING ISSUE 7: SHOULD SBC ILLINOIS' DISCLAIMER ABOUT VOIP BE INCLUDED IN THE AGREEMENT?

ICA Reference: Invoicing § 11

SBC proposes language that exempts billing for VoIP traffic from the stake date limitations in the Invoicing Appendix. MCI proposes that the ICA be silent on this issue. We adopt SBC's proposed language.

The FCC has initiated a rulemaking on VoIP-related services that presumably will establish clear guidelines on the intercarrier compensation scheme applicable to such traffic. *See* Notice of Proposed Rulemaking, *Review of Regulatory Requirements for IP-Enabled Services*, WC Docket No. 04-36, 19 F.C.C. Rcd 4863 (rel. Mar. 29, 2004). Because the default stake date for backbilling in the Invoicing Appendix (*see* § 7.4) could be interpreted to include billing for VoIP traffic, SBC has proposed an exemption applicable to both parties while the proper treatment of VoIP is being debated before the FCC and elsewhere.

MCI asserts the FCC is addressing the matter in another docket and that it would waste resources to litigate the issue in two proceedings. We find that our consideration of SBC's language would not duplicate the FCC's efforts, because SBC is not asking the Commission to decide any substantive issue regarding the treatment of VoIP traffic. SBC's request is that the ICA keep the parties' options open regarding the billing of such traffic. This would accord with the FCC's position; the agency has made clear that a carrier generally should be held retroactively liable for access charges that it did not pay for traffic routed via Internet Protocol. *See* Order, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, 19 F.C.C. Rcd 7457, ¶¶ 22-23 (released Apr. 21, 2004).

We find that the Agreement should not be left silent on this issue and risk leaving the parties unable to collect access charges to which they would otherwise be entitled. SBC's exemption language is reasonable and adopted.

SBC LIDB ISSUE 1: NOW THAT USTA II IS OFFICIAL, SHOULD THE AGREEMENT CONTAIN A LIDB APPENDIX AT ALL?

ICA Reference: Entire LIDB Appendix

As explained above, federal law precludes the inclusion of any terms and conditions for unbundled local switching. Since LIDB access pertains only to MCI's use of SBC's unbundled local switching, the Commission holds that the LIDB section should be deleted in its entirely, and that all LIDB issues in this proceeding are dismissed as moot.

LIDB ISSUE 1; LIDB AND CNAM-AS ISSUE 1; SBC CNAM ISSUE 2:

WHAT TERMS AND CONDITIONS SHOULD APPLY TO THE ADMINISTRATION AND THE STORAGE OF LIDB AND CNAM RECORDS?

ICA References: LIDB and CNAM-AS Appendix (entire); LIDB § 7.5; UNE § 17.5; CNAM § 4.13

The Line Information Database ("LIDB") and the Calling Name ("CNAM") database each contain comprehensive information about MCI's end users. This data can be provided only by MCI since it relates exclusively to MCI's end users. Moreover, MCI's records in LIDB and CNAM can only be administered (*i.e.*, added to, changed or deleted) by MCI, since only MCI knows when such changes need to be made. The question presented by this group of issues is whether the LIDB and CNAM Administration & Storage ("AS") Appendix should be included in the ICA (as SBC proposes) or not (as MCI proposes).

MCI does not explain why the LIDB and CNAM-AS Appendix should be excluded, other than to assert that it does not wish to store that information with SBC as provided for in the SBC LIDB-AS Appendix. That, however, is not an option. SBC's switches treat all calls the same – regardless of whether the call involves an SBC end user or MCI end user served by UNE-P – so MCI's end users served by UNE-P must have their information in the LIDB and CNAM databases so they can receive the same services as all other end users served by SBC's switches.

The question, then, is whether the ICA should contain provisions that discuss how MCI is to administer (*i.e.*, change, add and delete) its customers' data. Just last year, in the AT&T arbitration (Docket No. 03-0329, at 92), the Commission answered this question by directing the parties to incorporate the LIDB and CNAM-AS Appendix in the agreement. The only caveat in that case was that the LIDB and CNAM-AS Appendix applied only to AT&T's use of LIDB and CNAM in connection with its end users served by SBC's unbundled local switching. SBC agrees to that outcome here. The Commission therefore adopts SBC's proposal and directs that the following language be inserted in the ICA:

> As defined in the attached LIDB and CNAM-AS Appendix, SBC will input information provided by MCI into LIDB for MCI accounts, where MCI uses SBC's unbundled local switch ports. Terms and conditions for administration of the LIDB for MCI where MCI does not use SBC's unbundled local switch ports have not been negotiated.

The essential elements of administering the data that are covered by the Appendix include: (1) administration of MCI's records for its end users; (2) ability to request emergency updates; (3) audits; and (4) data migration. Under MCI's proposal, there would be no such terms and conditions. MCI proposes in LIDB Section 7.5 only that "for MCI's end user customers served by a UNE-P, SBC shall administer line records in the same manner that it administers such line records for its retail end user customers . . . ." That proposal is inadequate because it requires *SBC* to administer MCI's records – meaning that SBC must initiate any additions, deletions or changes to the records (*e.g.*, name changes). Clearly, SBC cannot do this, because this is MCI end user information which SBC does not have. SBC simply provides the means

(*e.g.*, the hardware, software, methods and procedures) for MCI to update its records, but it is MCI's responsibility to create, modify, update and delete its own customer's records.

For these reasons, the Commission adopts SBC's proposed language for LIDB and CNAM-AS Appendix, LIDB Section 7.5, CNAM Section 4.13 and UNE Section 17.5.

LIDB ISSUE 2: SHOULD THE DEFINITION OF "SERVICE PLATFORM" BE INCLUDED IN THE AGREEMENT?

ICA Reference: LIDB § 2.19

LIDB contains end user and carrier proprietary information on virtually every working telephone number provided by the storing carrier, as well as the programming logic needed to perform query/response processing. LIDB enables carriers to access data to provide for call routing, transmission, billing and collections, and other provisioning of telecommunications services. The most well-known application of LIDB is the validation of requests for calls billed to calling cards. Carriers use "Service Platforms" to obtain access to SBC's LIDB by launching queries over the Common Channel Signaling ("CCS") network using SS7 protocol. A Service Platform is generally, but not always, a switch such as an Operator Services Platform ("OSP") switch or an end office switch.

SBC proposes to define "Service Platform" so that all relevant terms are defined. MCI opposes SBC's language, but we find SBC's proposed definition reasonable and appropriate.

The term "Service Platform" is used throughout the LIDB Appendix. Notably, the term Service Platform is used in undisputed Sections 2.14 and 11.1 of the LIDB Appendix. SBC defines Service Platform as, "the physical platform that generates Queries and is identified to LIDB by an Originating Point Code contained in the Query. A Service Platform may be a telephony switch or any other platform capable of correctly formatting and launching Queries and receiving the associated Response." The definition correctly states that Service Platforms can be switches (*e.g.*, end office switches or operator service switches) or non-switches (*e.g.*, service control points and protocol converters). Rather than list every possible platform that can access the LIDB, SBC proposes the term "Service Platform" – a term that is broad enough to encompass any platform capable of interfacing with the database for query and response processing, including platforms that may be deployed after the effective date of this ICA.

LIDB ISSUE 3: SHOULD THE LIDB APPENDIX CONTAIN SBC'S PROPOSED ACKNOWLEDGEMENT CONCERNING THE OWNERSHIP OF LIDB?

ICA Reference: LIDB § 3.1

SBC's proposal for Section 3.1 states that SBC does not own a LIDB database (*i.e.*, the hardware, software and systems needed to store data and respond to queries), but instead uses SNET Diversified Group ("SNET DG") as its LIDB provider. We find this language reasonable because it is true. SBC does not own a LIDB database. Nor does SBC sell its LIDB information to SNET DG. Rather, SBC stores the line information that it owns in the database of SNET DG, and SNET DG makes that information available to SBC, together with other LIDB data stored

there by non-SBC companies. SNET DG is an unregulated entity (like other companies such as Illuminet) that provides services to carriers. Like any other database provider, SNET DG also develops enhanced functionality for its customers.

MCI asserts that SBC sells LIDB data to SNET DG. But that assertion is inaccurate, and also does not relate to the language proposed by SBC. SBC's proposal seeks only an acknowledgement of the fact that SBC does not own a LIDB database, *i.e.*, the hardware, software and systems needed to store data and respond to queries. That is what Section 3.1 does, and it therefore is adopted.

LIDB ISSUE 4: OTHER THAN PER QUERY ACCESS THROUGH ULS, SHOULD SBC BE OBLIGATED TO PROVIDE ACCESS TO LIDB AS A UNE?

ICA Reference: LIDB § 3.2

SBC proposes language for Section 3.2 that states that access to LIDB as a UNE under the ICA is available only when the MCI end user is served by an SBC switch or "Service Platform." As explained in more detail in our discussion of CNAM Issue 2, this is a correct statement of the law, because the *TRO* removed call-related databases from the list of unbundled network elements, except when provided in conjunction with an ILEC's unbundled local switching. *TRO* ¶ 551.

MCI articulates no reason for its opposition. To the contrary, MCI conceded in testimony that the LIDB database is a UNE only if it is part of switching provided as a UNE by the ILEC. And in Section 4.1 of the CNAM Appendix MCI agreed to the same language it is disputing here. In CNAM Section 4.1, MCI properly recognized that SBC's duty to provide unbundled access to a call-related database applies only where SBC is also obligated to provide unbundled local switching. There is no reason why language that is appropriate for CNAM is not also appropriate for LIDB, and the Commission therefore approves SBC's proposed language for Section 3.2.

LIDB ISSUE 5: FOR SWITCHED ACCESS TO SBC'S LIDB, SHOULD THE FCC ACCESS TARIFF APPLY, OR THIS CONTRACT?

ICA References: LIDB § 3.2.1, 3.2.1.2

LIDB Issue 5 is the converse of LIDB Issue 4. Where Issue 4 asks whether access to LIDB is limited to situations where MCI uses SBC's unbundled local switching, LIDB Issue 5 asks whether all other access should be pursuant to the terms of SBC's LIDB tariffs. We find that it undeniably should be. We need not concern ourselves with the terms and conditions that apply to non-UNE-based access to LIDB, because SBC has both a federal and state LIDB tariff that covers this situation. *See e.g.*, FCC Tariff No. 2, Section 6.9.1(9); Ill. C.C. Tariff No. 21, Section 6.9.1(9). Pursuant to these tariffs, MCI may purchase access to SBC's LIDB information on nondiscriminatory terms and conditions and at just and reasonable rates. SBC's language makes this clear and is adopted.

MCI, on the other hand, advances the theory that it is entitled to non-discriminatory access to LIDB pursuant to the dialing parity provisions of Section 251(b)(3) of the 1996 Act. MCI is not requesting a bulk download of the LIDB database (it already agreed to "access LIDB on a call to call basis" in Section 7.2), but nonetheless asserts the right to access LIDB at TELRIC rates as a matter of "dialing party." This is the same theory MCI advances in support of its claim for a bulk download of the CNAM database (and its claim to access to the 800 database), and we reject it here for the reasons explained in our discussion of CNAM Issues 1 and 2.

LIDB ISSUE 6: SHOULD MCI BE PROHIBITED FROM USING LIDB INFORMATION OTHER THAN FOR ITS END USER CUSTOMERS IN SBC ILLINOIS?

ICA References: LIDB §§ 7.2; 3.2.1.1; 3.2.4, 4.3

In these sections, SBC proposes three limitations on MCI's use of LIDB data it obtains under the ICA: (1) that MCI use LIDB information within the geographic area served by SBC switches (Section 3.2.4); (2) that MCI use LIDB for the same purposes as SBC, *i.e.*, to provide local exchange service (Section 7.2); and (3) that MCI not attempt to recreate the LIDB database by copying and storing each query it makes (Section 7.2). We find that these limitations track the limited access MCI has to SBC's LIDB information as a UNE. Since MCI is entitled to UNE access only when MCI is serving an end user with SBC's unbundled local switching, by definition that end user will be within SBC's operating territory and will be provided local exchange service by MCI. SBC's language reflects this reality and is adopted.

Apparently, what MCI has in mind is that, as it queries the database, it will capture that information to include in its own LIDB database. MCI explains that it wants to use such information to provide LIDB validation for calls made through its affiliate carriers. It is not clear, however, who those affiliates are or why they should be permitted to make derivative use of LIDB information provided under this 251 interconnection agreement. This is particularly true if these affiliates are interexchange carriers that would otherwise purchase LIDB from SBC's access tariffs. MCI's language would allow it to arbitrage between UNEs and access services, *i.e.*, to substitute LIDB purchased by a CLEC at TELRIC for LIDB purchased by an interexchange carrier at access rates. The Commission will not permit this and instead adopts SBC's proposed language for Sections 3.2.1.1, 3.2.4 and 7.2.

Section 4.3 involves a slightly different aspect of the issue. Here, SBC asks MCI to acknowledge that queries to the LIDB database will not work unless they are formatted in the proper way, *i.e.* unless they use the correct "translation type" and "subsystem number." As a pure matter of network operation, if these conventions are not followed, a LIDB query might be misrouted to an incorrect database or more likely would fail altogether. Therefore, SBC's language is adopted.

LIDB ISSUE 7: SHOULD A CLEC HAVE THE ABILITY TO DETERMINE WHICH LIDB AND CNAM DATABASES ARE QUERIED?

ICA Reference: LIDB § 3.4

SBC's proposal for Section 3.4 allows SBC to determine which LIDB or CNAM databases its service platforms (*e.g.*, its operator service platforms) will query. We agree with SBC that it must be able to determine which databases to query to ensure that it provides the best service possible. Once these decisions are made, all calls initiated from an SBC switch – including those initiated by MCI's UNE-P customers served by that switch – are handled in the same way and are routed to the same databases.

MCI does not object to allowing SBC to decide which LIDB or CNAM databases its switches should query. MCI does, however, say that SBC should have this ability only if it provides access to LIDB on a non-discriminatory basis and at parity with what it provides itself. MCI does not explain what this actually means. We find that MCI's proposal in Section 3.4 is unnecessary and would be apt to lead to disputes about what the language really means. Moreover, any concern about "discrimination," is fully addressed by agreed language in Section 3.2 which requires SBC to provide "nondiscriminatory access to LIDB as an unbundled network element."

For these reasons, we adopt SBC's proposal for Section 3.4 of the LIDB Appendix.

LIDB ISSUE 8: WHAT AUDIT PROVISION SHOULD APPLY TO THE LIDB APPENDIX?

ICA Reference: LIDB § 3.8

In Section 3.8, SBC proposes that the audit provision from the LIDB and CNAM-AS Appendix apply to LIDB audits. We agree with SBC that this provides an established and effective audit process – the same process approved by this Commission when we adopted the Administration and Storage Appendix in the AT&T Arbitration (No. 03-0239). Carriers across the country query LIDB and they require that the data of all companies in LIDB be complete, accurate and timely – otherwise their services will not work as intended. SBC's audit process is vital to achieve this result. MCI opposes this proven process and asks that a special audit process be developed just for it. We find that this would require SBC to develop and administer two audit processes – one for MCI and another for the rest of the industry – for no good reason. MCI's proposal is rejected.

We also reject MCI's proposal because it addresses only a validation audit. Much of the data stored in LIDB is not related to validations, so MCI's proposal is incomplete. For example, SBC's proposal includes a source audit (LIDB and CNAM-AS Appendix § 4.6.2) to verify that each carrier's line records in the LIDB match the source of the carrier's line records. MCI's does not.

We reject MCI's proposal that the audit is to be performed seven nights a week. While SBC states its objective is to run the audit daily, there might be a day when the audit does not run. For example, if system resources are taken over by query demand, administrative functions

like audits may be deferred. We also reject MCI's proposal that discrepancies discovered by an audit will be resolved the next business day. While most discrepancies are corrected the same day, some require more time. SBC's proposal provides additional time to accommodate those circumstances when a discrepancy requires significant research to resolve.

LIDB ISSUE 9: WHICH PARTY'S TERMS AND CONDITIONS FOR ACCESS AND RESTRICTED THIRD PARTY DATA SHOULD BE INCLUDED IN THE APPENDIX?

ICA References: LIDB §§ 3.19, 7.7, 7.8

This issue concerns third-party data present in the LIDB database. Third party carriers ("Account Owners") place their end user information in the LIDB database administered by SNET DG. SBC proposes language that gives necessary protections to this third-party end user data and that language is adopted.

Restricted Access: In Section 3.19, SBC proposes to acknowledge that Account Owners may establish restrictions that limit SBC and MCI from accessing all or part of that Account Owner's data in LIDB. SBC is not advocating that Account Owners establish such restrictions; it is merely recognizing that Account Owners can (and do) impose limitations on the use of their data. MCI objects to SBC's proposal because it would allegedly restrict MCI's access to certain information in the LIDB database. We find that this concern is unfounded. SBC and MCI will be subject to the same access limitations imposed by Account Owners because both will be served by the same switch. The LIDB database can restrict or deny query access only at the switch level, so MCI and SBC will be subject to the same limitations on all calls initiated from the particular switch. SBC's language in Section 3.19 specifically says this. SBC's proposed language for Section 3.19 is adopted.

Account Owner Inquiries: In Section 7.7, SBC proposes language that allows an Account Owner to ask MCI to identify the purposes for which MCI uses the Account Owner's information. This is ultimately an issue concerning the proper use of end user information and the protection of end user privacy. We find that SBC's language provides a reasonable means by which Account Owners can inquire of MCI about its use of their information. We further find that SBC's language is commercially reasonable and for all the reasons explained in CNAM Issue 4 is adopted.

Limits On Use: In Section 7.8, SBC proposes that MCI acknowledge that Account Owner information may contain proprietary or competitively sensitive information and that MCI agree not to use the information for purposes outside the scope of the LIDB Appendix. For the reasons discussed in connection with our resolution of LIDB Issue 6, SBC's proposal for Section 7.8 is adopted.

LIDB ISSUE 10: **WHICH PARTY'S STATEMENT OF LIDB QUERY COST RECOVERY SHOULD BE INCLUDED IN APPENDIX LIDB?**

ICA Reference: LIDB § 6.2

The issue is whether the cost for LIDB queries is not included in SBC's ULS port charge (SBC's position), or whether it is (MCI's position).

MCI asserts that LIDB query charges are included in the ULS port charge. There is no support for that assertion. In fact, SBC witness Currie demonstrated that neither SBC's ULS port charge nor its ULS usage charge recovers the cost of LIDB queries. Instead, SBC's compliance costs for access to LIDB are included in its Access to LIDB Cost Study from Docket 98-0396. MCI's proposed language is rejected.

SBC's language correctly states that LIDB charges are recovered by the network element that causes the LIDB database to be queried. For example, when a CLEC's end user accesses the Operator Services Platform to make a calling card call, a LIDB query is launched to validate whether the billing account is allowed to accept the billing. The charges for the Operator Services offering will recover the LIDB cost, just as all other Operator Services-related costs are recovered by the Operator Services rates. SBC's language in Section 6.2 accurately describes this arrangement and is adopted.

LIDB ISSUE 12: **WHAT TERM SHOULD APPLY IN THE EVENT OF UNAUTHORIZED USE OF LIDB INFORMATION**

ICA Reference: LIDB § 7.10

SBC's proposal for LIDB Section 7.10 permits it to block access to LIDB if MCI repeatedly misuses the information. This language is identical to SBC's proposal for CNAM Section 4.20 (CNAM Issue 6), and we find the language is necessary in both appendices.

LIDB ISSUE 13: **SHOULD THE COMMISSION ADOPT SBC'S LIABILITY AND INDEMNITY LANGUAGE FOR LIDB IN ADDITION FOR THAT CONTAINED IN GTC?**

ICA Reference: LIDB § 9

SBC proposes six paragraphs to address the special liability issues that arise in the LIDB context. MCI opposes each SBC proposal. As explained further below, we find that all of SBC's proposals are reasonable and adopted.

Section 9.2: SBC proposes that each party's liability be limited to "the amount of actual direct damages" and in no event exceed the amount paid for LIDB queries under the ICA. We find that this standard limitation of liability is reasonable. MCI argues that the limitation of liability established in Section 15 of the GT&C is adequate protection for SBC. We disagree. That limitation of liability is high – twenty-five million dollars during any single contract year – and does not take into account the fact that SBC's LIDB data includes data provided by CLECs.

It is those CLECs – not SBC – that provide the data, update the data, and make any additions or deletions to that data. SBC cannot vouch for the accuracy of LIDB data provided by other carriers, and it is therefore reasonable to limit its liability as proposed in Section 9.2.

Section 9.3: This section confirms that the limitation of liability established in Section 9.2 applies to a party, its affiliates, subsidiaries or parent corporation including its directors, officers, employees or agents. We find that this language does not expand the limitation of liability; it merely specifies the related entities to which the limitation of liability applies.

Section 9.4: This language is identical to agreed language from the CNAM Appendix, Section 9.1. It provides that SBC shall not have any liability if the LIDB system is inaccessible due to system outage and that SBC will not be liable for unauthorized use of LIDB data. We find this language reasonable.

Section 9.5: This language is identical to agreed language from the CNAM Appendix, Section 9.2. MCI has already agreed to this language in the CNAM Appendix so we find it should be incorporated in the LIDB Appendix. The language makes clear that SBC is not the sole source of the information in the LIDB database and therefore cannot be liable for inaccuracies in line record information provided to MCI.

Section 9.6: This language provides that SBC makes no warranty regarding the accuracy or completeness of LIDB information in its database. As we discussed above, SBC is not the sole source of information in its LIDB database, and cannot be held responsible for inaccurate information provided by other carriers.

Section 9.7: SBC inadvertently included this language in the LIDB Appendix. MCI has already agreed to this language in the CNAM Appendix, and that is where it belongs.

LIDB ISSUE 14: SHOULD SBC BE REQUIRED TO PROVIDE MCI ACCESS TO ORIGINATING LINE NUMBER SCREENING QUERY?

ICA References: LIDB §§ 3.3.6, 3.26

<u>Alternative 1</u>

The parties disagree as to whether SBC is obligated to provide MCI with Originating Line Number Screening Query ("OLNS") under this ICA. OLNS is a LIDB-related service developed by SNET DG. It is not offered by SBC in its tariff or otherwise. OLNS is an enhanced LIDB feature designed for an operator services platform that provides the originating screening profile of a caller. We find that SBC cannot be required by MCI to provide enhanced services developed by SNET DG anymore than MCI could require SBC to provide enhanced services developed by Illuminet (or any other vendor of LIDB services) if SBC used Illuminet as its vendor.

We find that OLNS cannot be part of the ICA because SBC Illinois does not own a LIDB database and does not own – or have the ability to provide – OLNS. MCI is wrong when it argues that OLNS "is a feature that SBC used to provide when it was required to offer LIDB as a

UNE." SBC never offered OLNS in Illinois, even when SBC owned and operated a LIDB database. At that time, OLNS capability did not exist on SBC Illinois' LIDB. OLNS service was developed and introduced by SNET DG. Simply put, OLNS is not an offering that SBC has or is capable of making in Illinois. It is an offering of an unregulated third party (SNET DG) and if MCI wishes to purchase the service, it can do so from SNET DG. SBC can not be required in a Section 251 agreement to act as a third party broker between MCI and SNET DG.

For these reasons, MCI's request to obtain access to OLNS as a UNE under Section 251 is rejected and SBC's language is adopted.

Alternative 2 (If Alternative 1 Not Adopted)

The parties disagree as to whether SBC is obligated to provide MCI with Originating Line Number Screening Query ("OLNS") under this ICA. Although we find for MCI on this issue, there is no rate for OLNS in Illinois. We therefore rule that the rate to be paid is the rate charged by SNET DG.

SBC LINE SHARING ISSUE 1:

SHOULD TIME AND MATERIAL CHARGES BE SET FORTH IN APPENDIX PRICING OR AS SET FORTH IN SBC'S TARIFF?

ICA References: Line Sharing §§ 8.2.1, 8.3.3.1, 8.10

For the reasons explained under xDSL Issue 4, the Commission adopts SBC's proposed language, and rejects MCI's.

LINE SHARING ISSUE 2: SHOULD LINE SPLITTING-SPECIFIC PROVISIONS BE INCLUDED IN THE PARTIES' APPENDIX LINE SHARING?

ICA Reference: Line Sharing § 3.3

Line Sharing Issue 2 concerns MCI's proposed language in Section 3.3 of Appendix Line Sharing stating that "[a]s set forth in this Appendix Line Sharing and Appendix Line Splitting of the Agreement, SBC Illinois shall support MCIm's ability to provide combinations of voice services, data services, or voice and data services over a single Loop." The Commission rejects MCI's proposed language, because it is vague, unnecessary, and inappropriate.

To the extent that MCI's language provides that SBC will comply with the terms of the Line Sharing and Line Splitting Appendices, the language is unnecessary, because inherent in the parties' contract is the obligation to comply with that contract. And to the extent MCI's proposed language is intended to expand SBC's obligations to support line sharing and line splitting beyond the obligations explicitly enumerated in the Line Sharing and Line Splitting Appendices, the Commission concludes that MCI's language is inappropriate. The very purpose of an interconnection agreement is to clearly define the parties' rights and obligations. If MCI believes SBC has line sharing obligations that are not spelled out in the Appendix Line Sharing,

then MCI should have proposed specific contract language to identify and implement those obligations in a concrete manner. MCI's proposed language, however, would merely introduce uncertainty and confusion into the parties' contract.

Moreover, MCI's proposed language inappropriately blurs the distinction between line splitting and line sharing. As this Commission has previously recognized, line sharing and line splitting are different activities with different requirements. *See, e.g.*, March 14, 2001 Order, Docket No. 00-0393, at 53-55. *Compare* 47 C.F.R. § 51.319(a)(1)(i) (defining line sharing obligations) *with* 47 C.F.R. § 51.319(a)(1)(ii) (defining line splitting obligations). Pursuant to the *TRO*, line sharing involves a separate network element, the high frequency portion of the electronic spectrum of a copper loop (the "HFPL") that is no longer subject to unbundling. Line splitting has never required the unbundled provision of an HFPL. Moreover, line sharing is limited to circumstances where the ILEC provides retail voice service using a copper loop, and the CLEC provides data service using the HFPL of that same loop. *TRO* ¶¶ 26, 255. Line splitting, on the other hand, does not involve the ILEC's provision of the HFPL to a CLEC, or the ILEC's continued provision of retail voice service. Rather, in a line splitting arrangement the ILEC provides a different UNE – an entire unbundled xDSL-capable loop. *Id.* ¶ 251.

As a technical matter, line *sharing* entails the provision of the HFPL UNE while SBC continues to provide retail voice service, while line *splitting* does not entail the provision of the HFPL UNE and SBC does not continue to provide retail voice service. As a technical matter, line *splitting* entails the provision of an unbundled xDSL loop, while two CLECs partner to split the loop and provide both voice and data service, while line *sharing* does not entail the provision of an unbundled xDSL loop or the cooperation of two partnering CLECs. In short, as the FCC has stated: "Line sharing and line splitting present two different scenarios under our rules." *Texas 271 Order*, ¶ 329.

In light of the clear differences between line sharing and line splitting, the Commission concludes the MCI's proposed language is inappropriate. Line sharing does not "support MCIm's ability to provide combinations of voice services, data services, or voice and data services over a single Loop," as MCI's proposed Section 3.3 states. To the contrary, line sharing, and the parties' Line Sharing Appendix, relate only to the situation where MCI leases the HFPL from SBC to provide xDSL-based data services, while *SBC* provides retail POTS service to the end user over the same loop. In other words, the Line Sharing Appendix relates only to supporting MCI's ability to provide *data* services (while SBC remains the retail voice provider), and MCI cannot provide voice service in a line sharing arrangement.

The Commission does not accept MCI's attempt to mix and match terms and conditions from the separate Line Sharing and Line Splitting Appendices. Line sharing and line splitting are different things, and in the *TRO* the FCC promulgated different rules to govern each. That is why the parties negotiated separate appendices for each, and that is why those appendices should remain separate. Accordingly, the Commission rejects MCI's proposed Section 3.3.

LINE SHARING ISSUE 3: IS THE HFPL AVAILABLE IN ANY SCENARIO WHERE SBC ILLINOIS IS NOT THE RETAIL VOICE PROVIDER OVER THE SAME LOOP?

ICA Reference: Line Sharing § 3.5

The Commission adopts SBC's proposed Section 3.5 of the Appendix Line Sharing, which states that the "HFPL is not available in conjunction with a combination of network elements . . . known as the platform or UNE-P . . . or any other arrangement where SBC Illinois is not the retail POTS provider." We conclude that SBC's proposed language properly implements the *TRO*'s line sharing requirements. Indeed, the Commission notes that MCI has already agreed to language in Section 3.4 of the Appendix Line Sharing stating that SBC will make the HFPL available only where "SBC Illinois is the provider of retail POTS analog voice service on the same Loop to the same end user customer."

In the *Line Sharing Order* (¶ 72), the FCC held that "incumbent carriers are not required to provide line sharing to requesting carriers that are purchasing a combination of network elements known as the platform." In the *TRO*, the FCC cited and reiterated this holding, stating that "incumbent LECs are only required to provide access to the HFPL if the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop over which the requesting carriers seek access to provide ADSL service." *TRO* ¶ 269. Moreover, the FCC defines line sharing as "the process by which a requesting telecommunications carrier provides [DSL] service over the same copper loop *that the incumbent LEC uses to provide voice service*, with the incumbent LEC using the lower frequency portion of the loop." 47 C.F.R. § 51.319(a)(1)(i) (emphasis added). In short, and as SBC's language provides, the HFPL is only available for existing line sharing arrangements where SBC is the retail voice service provider – which is not the case where MCI leases the UNE-P.

MCI asserts that where MCI leases the UNE-P, MCI is allowed to use the high-frequency portion of the loop to provide data service. But that is not the issue here. The Commission notes that SBC does not deny that in cases where SBC is not the retail voice service provider, MCI can still provide data services – and other language in the contract allows MCI to do that. But where MCI seeks to provide data services over the high frequency portion of the loop where SBC is not the retail provider, MCI must purchase the entire xDSL loop, or partner with another CLEC that purchases the entire xDSL loop. As the FCC held, "[i]n the event that the customer ceases purchasing voice service from the incumbent LEC, either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop." *TRO* ¶ 269. And in such circumstances, SBC does not provide the HFPL; rather, it provides an entire xDSL loop.

Finally, the Commission notes that by the time the parties' agreement goes into effect (after October 1, 2004), SBC will no longer be required to provision *new* HFPLs, but will be required to provide the HFPL only for pre-existing, grandfathered HFPL customers. *TRO* ¶ 265; 47 C.F.R. § 51.319(a)(1)(i)(B). Thus, where SBC is providing MCI the UNE-P (and hence not providing the HFPL), MCI is not allowed to purchase the HFPL.

LINE SHARING ISSUE 5: SHOULD THE GRANDFATHERED END-USER PROVISION IN THE CONTRACT REFLECT THE FCC'S *TRO* FINDINGS?

ICA Reference: Line Sharing § 4.1

Line Sharing Issue 5 concerns the terms and conditions in Section 4.1 of the Appendix Line Sharing that apply to "grandfathered" HFPL customers (those that were in service before October 2, 2003 and continue to remain in service). In the *TRO*, the FCC held (¶ 264) that, "Until the next biennial review, a proceeding that will commence in 2004, we grandfather all existing line sharing arrangements unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user customer. During this interim period, we direct incumbent LECs to charge competitive LECs the same price for access to the HFPL for those grandfathered customers that they charged prior to the effective date of this Order." *See also* 47 C.F.R. § 51.319(a)(1)(i)(A).

The Commission concludes that SBC's proposed language for Section 4.1 properly implements this requirement, while MCI's does not. For instance, MCI's proposed language, unlike SBC's, provides for grandfathering "[t]o the extent MCIm began providing HFPL to an end user customer . . . ." But MCI does not provide the HFPL to an end user customer. Rather, SBC provides the HFPL to MCI, and MCI provides xDSL-based service to an end user customer over the HFPL.

Moreover, MCI's language also fails to clearly state when the grandfathering will end. The FCC's rule states that grandfathering must end for a particular customer whenever the CLEC "discontinues providing xDSL service to that particular end-user customer." *TRO* ¶ 264. *See also* 47 C.F.R. § 51.319(a)(1)(i). MCI's proposed language, however, could be interpreted to grandfather existing HFPLs in perpetuity as long as MCI has not ceased providing HFPL to that end user customer at the time of the contract formation, and notwithstanding any disconnections thereafter. That would violate federal law. SBC's proposed contract language, on the other hand, clearly and correctly states that grandfathering will end when "MCIm's HFPL to the end-user customer is disconnected for whatever reason."

Additionally, MCI's proposed contract language fails to reflect the FCC's holding that its HFPL grandfathering requirement would extend only until the next biennial review. *TRO* ¶ 264. MCI thus proposes to give itself greater grandfathering rights than those created by the *TRO*. SBC's proposed language, on the other hand, properly provides that grandfathering shall end when "the FCC issues its Order in its Biennial Review Proceeding or any other relevant government action which modifies the FCC's HFPL grandfather clause established in the its *Triennial Review Order*."

LINE SHARING ISSUE 10:

SHOULD SBC ILLINOIS' RESERVATION OF RIGHTS AND INTERVENING LAW LANGUAGE BE INCLUDED IN APPENDIX LINE SHARING?

ICA Reference: Line Sharing § 13

For the reasons explained under Line Splitting Issue 10, the Commission approves SBC's proposed language for Section 13 of the Line Sharing Appendix.

LINE SPLITTING ISSUE 1:

WHICH PARTY'S DESCRIPTION OF THE LINE SPLITTING OBLIGATION SHOULD BE INCLUDED IN THIS AGREEMENT?

ICA References: Line Splitting §§ 1.1, 2.8, 2.8.1, 3.5, 3.9, 3.10, 3.11

Line Splitting Issue 1 concerns the proper definition of line splitting. The Commission adopts SBC's proposed language. In particular, the Commission concludes that MCI's proposal to define line splitting as an "unbundled network element" is inconsistent with federal law.

To begin, line splitting is not even a network element. Section 153(29) of the 1996 Act defines a "network element" as "a facility or equipment used in the provision of a telecommunications service," including "features, functions and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). Line splitting is none of these things. Rather, line splitting is an arrangement between two CLECs to use a single copper loop to provide both voice and xDSL-based data service. 47 C.F.R. § 51.319(a)(1)(ii). Similarly, the Commission has described line splitting as "an arrangement through which non-incumbent telecommunications carriers partner with one another to provide end user customers with both voice grade and high speed service over a copper loop." June 11, 2002 Order, Docket No. 01-0614, at 31.

Separate and apart from the fact that line splitting is not a network element, it is not an *unbundled* network element. Unbundled network elements are network elements that the FCC has determined must be unbundled because they satisfy the impairment requirement of Section 251(d)(2) of the 1996 Act. And nowhere in the *TRO* did the FCC apply an impairment analysis to line splitting.

Third, the FCC's line splitting requirements themselves make clear that line splitting is not a UNE. The FCC held that "*when competitive carriers opt to take an unbundled stand-alone loop*, the incumbent LEC must provide the requesting carrier with the *ability* to engage in line splitting arrangements." *TRO* ¶ 251 (emphases added). As the governing FCC rule states, ILECs must "provide a requesting telecommunications carrier that obtains an *unbundled copper loop* from [the ILEC] with the ability to engage in line splitting arrangements with another competitive LEC." 47 C.F.R. § 51.319(a)(1)(ii) (emphasis added). In other words, when MCI

engages in line splitting with another CLEC, the UNE is not the "line splitting," but is the underlying loop. While the ILEC must "permit line splitting" so that the CLEC leasing the loop can "partner" with another CLEC to provide voice and data service (*id.* n.758), the only network element (and UNE) the ILEC provides is the underlying loop – in other words, allowing MCI to enter into a line splitting arrangement with another CLEC when it leases a UNE loop is neither a network element nor a UNE provided by SBC.

The Commission notes MCI's arguments regarding the alleged competitive merits of line splitting, but concludes that those arguments are irrelevant here. Before something may be designated a UNE, at least two threshold questions must be resolved: (1) is the thing in question a network element, and (2) if it is, has the FCC concluded that the impairment standard of the 1996 is satisfied? No matter how beneficial line splitting may be, that does not make it a network element, or a UNE.

Contrary to MCI's suggestion, there is no need to define line splitting as a UNE in order to provide regulatory certainty or to preserve line splitting obligations or to increase choice. An FCC rule already requires ILECs to permit CLECs to engage in line splitting, and the ICA will include numerous contract provisions (indeed, an entire Appendix) to memorialize and implement that FCC rule, and both the Commission and the FCC can enforce that rule.

In short, the Commission rejects MCI's proposed contract language defining line splitting as a UNE. SBC's proposed contract language, on the other hand, appropriately defines line splitting in accordance with federal law, and the Commission thus approves SBC's language.

In its proposed Appendix Line Splitting Section 1.1, SBC proposes to state that the Appendix Line Splitting sets forth the terms by which SBC will provide "access to UNEs (including the 2-wire xDSL Loop offering[)] . . . in a manner that allows MCIm to engage in UNE Line Splitting in accordance with the FCC's Triennial Review Order and associated Lawful and effective implementing rules . . . ." That, of course, is precisely the purpose of the Appendix, and thus the Commission approves SBC's language.

Section 2.8 contains SBC's proposed definition of line splitting which closely tracks the FCC's definition of line splitting. 47 C.F.R. § 51.319(a)(1)(ii).

The Commission agrees with SBC that SBC's proposed language, unlike MCI's, appropriately distinguishes between two types of line splitting: line splitting where MCI leases unbundled local switching and shared transport from SBC, and line splitting where MCI provides its own switching (*i.e.*, where MCI leases only a stand-alone 2-wire xDSL loop). SBC proposes to define the former, for purposes of the parties' contract, as "UNE Line Splitting." In accordance with the *TRO*, SBC's proposed language properly provides that UNE Line Splitting is available only where SBC is required to provide unbundled local switching. The Commission also approves SBC's proposed contract provisions that expressly allow MCI to convert an existing UNE-P arrangement into a UNE Line Splitting arrangement.

The Commission disagrees with MCI's objections to SBC's proposed provisions. SBC's proposed Section 3.5, which provides that in order to use UNE Line Splitting, the end user's loop and switch port must be located in the same central office does not improperly restrict MCI's use

of unbundled local switching. Rather, the undisputed evidence shows that the process that SBC has developed for UNE Line Splitting does not work, as a technical matter, if the loop and switch port are not physically located in the same central office. Moreover, SBC has stated is not aware of any CLEC that has requested or attempted to engage in UNE Line Splitting using a switch port and an xDSL loop located in different central offices. Nor does MCI claim that it would ever attempt to do so, or explain how such a line splitting arrangement should or could be effectuated.

The Commission also rejects MCI's objection to the proposed portions of Section 3.9 stating that, in order to convert a line sharing arrangement to a line splitting arrangement, (1) the data CLEC using the HFPL must disconnect the HFPL after SBC disconnects its voice service, and (2) the voice and data CLECs must have an agreement to share the loop. The first condition is necessary because the HFPL is available, by definition, only in connection with SBC's retail voice service. *TRO* ¶ 269. While the data CLEC can continue to use the same loop to provide data service, as a technical matter the HFPL UNE must be disconnected because SBC instead will provision an entire stand-alone xDSL loop UNE. The Commission concludes that the second condition too is necessary. Contrary to MCI's assertion, this condition does not require the data CLEC to have a line splitting arrangement in place in order to reuse the loop. Rather, as SBC has demonstrated, the data CLEC can always reuse the loop. But if the data CLEC and a voice CLEC are to share the loop, then they must have an agreement to share the loop.

The Commission also rejects MCI's objection to the language in SBC's proposed Section 3.10 that would require MCI to "make all cross-connections within its collocation space." MCI asserts that this language is "unnecessary since MCI is solely responsible for performing the activities *within its collocation space*," "[s]ince work within MCI's collocation cage does not involve SBC," and because "no party would reasonably expect SBC to perform cross connections within MCI's collocation space." If that is the case (and it is), then the Commission is hard-pressed to see MCI's objection to including language in the contract making this crystal clear, as SBC's proposed language does.

Finally, the Commission rejects MCI's proposed "alternative" contract language. That language, like MCI's originally proposed contract language, violates the *TRO* and is unreasonable, for numerous reasons.

First, MCI defines line splitting as a "UNE service offering" (MCI Alternate Section 2.8.1), whereas the FCC has defined it as a process engaged in by two CLECs (47 C.F.R. § 51.319(a)(1)(ii)). The FCC's rules do not require the creation of a "line splitting UNE service offering," but require ILECs to "provide a requesting telecommunications carrier that obtains an unbundled copper loop from [the ILEC] with the ability to engage in line splitting arrangements with another competitive LEC." 47 C.F.R. § 51.319(a)(1)(ii). Moreover, SBC cannot physically provide line splitting as an end-to-end service because, among other things, line splitting requires an agreement and cooperation between two CLECs, and because some activities, such as placing cross-connects inside the CLEC's collocation space, cannot be performed by SBC (as MCI admits);

Second, MCI defines line splitting to include use of a loop by one CLEC to provide both data and voice service. MCI Alternate Section 2.8.1. While MCI is able to use a loop to provide

both voice and data service, that is not "line splitting." Line splitting, as defined by federal law, is "the process in which one competitive LEC provides narrowband service over the low frequency of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop." 47 C.F.R. § 51.319(a)(1)(ii) (emphases added);

Third, MCI's language provides that the loop will be "purchased by the Voice CLEC" (MCI Alternate Section 2.8.1), while the FCC's line splitting requirements allow either a voice CLEC or a data CLEC to purchase the loop.

LINE SPLITTING ISSUE 3:

WHAT TERMS AND CONDITIONS SHOULD APPLY FOR LINE SPLITTING WITH A CLEC-OWNED SWITCH?

ICA Reference: Line Splitting § 7.3

Issue Line Splitting 3 concerns the procedures for line splitting when MCI (or a third party) provides local switching. The Commission agrees with SBC that in such an instance, SBC should abide by the outcome of any statewide collaboratives addressing such circumstances. The Commission rejects MCI's proposed procedures, because those procedures violate the FCC's rules.

MCI proposes that SBC be required to cross-connect the voice CLEC's facility-based switching in one collocation arrangement to the data CLEC's splitter in the data CLEC's second collocation arrangement (what MCI's language refers to as "an additional CLEC-to-CLEC connection"), in lieu of the two CLECs providing their own cage-to-cage cross connects. The FCC's rules, however, provide that an ILEC has no obligation to cross-connect the equipment of two CLECs so long as the ILEC allows the CLECs to provide their own cross-connects. FCC Rule 323 provides that "[a]n incumbent LEC shall provide, at the request of a collocating telecommunications carrier, a connection between the equipment in the collocated spaces of two or more telecommunications carriers, *except to the extent the incumbent LEC permits the collocating parties to provide the requested connection for themselves*." 47 C.F.R. § 51.323(h)(1) (emphasis added). Because SBC allows CLECs to connect their collocation arrangements via a collocation cage-to-cage cabling offering, under the FCC's rules SBC cannot be required to provide such cross-connects itself. MCI's proposal thus must be rejected.

The Commission does not agree with MCI's suggestion that SBC's failure to develop procedures to perform CLEC-to-CLEC cross connects is anticompetitive. SBC already allows MCI (and all other CLECs) to provide such cross-connects for themselves, so there is no reason for MCI to depend on SBC to create a new process for SBC to do work that MCI can perform for itself. That said, while SBC is not required to perform CLEC-to-CLEC cross connects, that does not prohibit the parties from developing new commercial, voluntary product offerings regarding such cross connects. The Commission notes that SBC has expressed willingness to entertain such proposals.

The Commission also does not agree with MCI's suggestion that the cross-connections it seeks are merely a routine network modification. In the *TRO*, the FCC defined a routine network

modification as activities that incumbent LECs regularly undertake for their own customers. *TRO* ¶ 632. In providing retail service, SBC does not regularly (if ever) cross-connect two CLEC collocations. Thus, such cross-connects are not a "routine network modification."

Moreover, MCI's proposal is not supported by the FCC's routine network modification rule. That rule requires ILECs to make "routine network modifications *to unbundled loop facilities*." 47 C.F.R. § 51.319(a)(8) (emphasis added). The cross-connect work proposed by MCI is not a modification to an unbundled loop. CLEC-to-CLEC cross connects do not provide access to an unbundled loop, and have nothing to do with provisioning an unbundled loop. Indeed, the cross-connects at issue would not provide access to *any* UNE.

Finally, the Commission finds that, as a practical matter, MCI's proposal is not feasible, and would unnecessarily complicate the provisioning process. The current network architecture allows CLECs to manage their own offerings with minimal SBC involvement. Moreover, the Commission notes that SBC has no processes in place to handle MCI's proposed architecture, and its current systems and processes are not designed to provision or maintain cross connects that do not provide any SBC-provided network component other than the cross connect itself. MCI's proposed process is also more complex and less efficient than the current process that is already available to MCI. The current process involves only a single multi-pair cable running between the CLEC collocation cages. MCI's proposal, on the other hand, would require multiple cabling, from the data CLEC's collocation cage to SBC's distribution frame, from the data CLEC's appearance on the frame to the voice CLEC's appearance on the frame, and from the frame to the voice CLEC's collocation arrangement.

For all these reasons, the Commission rejects MCI's proposed language for Line Splitting Section 7.3, and adopts SBC's.

LINE SPLITTING ISSUE 4:

WHAT PROVISIONING INTERVALS SHOULD APPLY FOR LINE SPLITTING?

ICA Reference: Line Splitting § 7.8

As the Commission explained above with respect to Line Splitting Issue 1, line splitting is not a UNE, but is a process or arrangement in which CLECs may engage using UNEs – a stand-alone unbundled xDSL loop, or an unbundled xDSL loop and unbundled local switching (if and when local switching is available as a UNE). Accordingly, when MCI orders UNEs to engage in line splitting, SBC should provide those UNEs in accordance with the same provisioning intervals that would apply if MCI were not engaging in line splitting, as SBC's proposed language provides. SBC's proposal is reasonable and appropriate, and the Commission approves that language. SBC already has a standard provisioning process and standard provisioning intervals for these UNEs. For xDSL loops, the standard provisioning interval is five business days. The Commission concludes that there is no reason to adopt different provisioning intervals merely because a CLEC intends to use the UNEs to engage in line splitting. Moreover, such an approach would create administrative problems, and would create unfair discrimination between CLECs based upon individual CLEC business plans.

The Commission does not share MCI's view that SBC's language is vague and contains no discernible interval. To the contrary, SBC's language could not be clearer: the standard provisioning intervals for the underlying UNEs will apply. If multiple activities are involved, the interval for the activity for the longest due date will apply. And in no event shall the interval offered to MCI "be longer than the interval offered to SBC's retail operations, to SBC's advanced services affiliate, or to any non-affiliated CLEC."

MCI proposes to create a new provisioning interval for xDSL loops (with or without unbundled local switching) when those loops are used for line splitting. The Commission concludes that MCI's proposal is unreasonable, and rejects that proposal for several reasons.

First, while MCI asserts that its proposed interval is the interval now in effect for line sharing, that is irrelevant. As explained above, line splitting is not the same as line sharing. Line sharing involves the provision of the HFPL UNE, while line splitting involves the provision of the xDSL loop UNE (possibly with unbundled local switching as well). SBC already has standard provisioning intervals for xDSL loops, and MCI has failed to explain why the provisioning intervals for a *different* UNE should apply, rather than the provisioning intervals that already apply to the xDSL loops used in line splitting arrangements.

Second, MCI's proposal would discriminate between CLECs; CLECs ordering the very same UNEs would receive different provisioning intervals depending on their intended use of the UNEs.

Third, the Commission finds that MCI's proposal is unworkable. The evidence establishes that in many cases, SBC simply does not know which UNEs would or would not be used for line splitting. Thus, to comply with MCI's proposal, SBC would be forced to modify the provisioning processes and intervals for all orders that could potentially be used in a line splitting arrangement, just in case a CLEC intended to engage in line splitting. MCI has not demonstrated that such sweeping changes are reasonable or warranted.

Fourth, the Commission concludes that MCI's proposal is unreasonable. MCI makes no exception for UNE orders that require loop conditioning, but would require that such orders be complete within three business days regardless of whether conditioning was required. However, the record establishes that loop conditioning generally requires a 10-business day interval, and it is unlikely SBC could meet a 3-day interval. Moreover, MCI has not presented any evidence that it would be reasonable to apply a 3-day interval to requests involving loop conditioning, or that SBC's standard loop conditioning intervals are unreasonable.

Fifth, MCI's proposal ignores the technical reasons why HFPL orders may have a shorter provisioning interval than stand-alone xDSL loops. The HFPL is available only for existing retail POTS lines where SBC already provides retail voice service. Thus, when a CLEC orders the HFPL, SBC is able to reuse the existing, working loop facilities, in most instances. But CLECs may order a new xDSL loop at any time, and are not limited to using working loop facilities. Thus, a technician dispatch is more frequently required on average for xDSL loops than for the HFPL, which means that a longer provisioning interval is necessary.

Sixth, the record demonstrates that substantial product development and programming work would be required to change the provisioning intervals for xDSL loops where a CLEC intends to line split, as MCI proposes. SBC's current provisioning flows are designed so that specific activities occur on specific dates within the provisioning cycle. In order to shorten the due dates for xDSL loops where a CLECs says that it intends to line split, SBC would first have to re-design its provisioning flows. The evidence establishes that the necessary OSS programming changes would involve considerable time and expense, and would force SBC to delay other CLEC OSS changes that have already been submitted and ranked with a higher priority in the Change Management Process.

Accordingly, the Commission rejects MCI's proposed language, and adopts SBC's.

LINE SPLITTING ISSUE 6:

WHAT TERMS AND CONDITIONS FOR MAINTENANCE AND REPAIR SHOULD APPLY TO LINE SPLITTING?

ICA References: Line Splitting §§ 3.12, 8.2, 8.2.1

As we explained in connection with Line Splitting Issue 1, line splitting is not a UNE, but is an activity or arrangement in which CLECs may engage using UNEs. Accordingly, the same standard trouble reporting and maintenance and repair terms and conditions that apply to the UNEs when MCI is not engaging in line splitting should apply when MCI uses those same UNEs to engage in line splitting, as SBC's proposed language provides. The Commission concludes that SBC's proposal is reasonable and appropriate, and adopts that proposal. SBC has already developed standard trouble reporting and maintenance and repair processes for xDSL loops (and unbundled local switching), and those same processes should apply whether or not the CLEC is using the UNEs to engage in line splitting. There is no reason to create new, special processes for line splitting.

MCI proposes contract language based on the trouble reporting language that SBC offers in the context of maintenance work on the HFPL. We do not approve that language because, as explained above (Line Splitting Issues 1 and 4), line splitting is not the same as line sharing. When MCI engages in line splitting, SBC does not provide the HFPL; rather, it provides an xDSL loop. Thus, the trouble reporting processes that apply to xDSL loops, not the HFPL, should apply.

The Commission finds that MCI's proposed language, moreover, ignores a significant operational difference between line sharing and line splitting – SBC provides voice service in the former situation, while in the latter, another CLEC, not SBC, provides voice service and thus performs the activities associated with a voice provider. The language proposed by MCI was intended to outline the relationship between SBC as the voice provider and a CLEC leasing the HFPL as the data provider. For instance, Section 8.2 is designed to address how SBC responds to a trouble report from its own voice end user when a CLEC is leasing the HFPL, and would provide SBC the right to restore the end user's voice service without the CLEC's approval in certain instances. But this same language does not apply in the line splitting context, where a second CLEC, not SBC, is providing voice service, and where SBC will not receive a trouble

report from the voice end-user. Similarly, MCI proposes language addressing the testing, maintenance, and repair of the splitter, but in the line splitting scenario SBC does not provide the splitter – MCI or its partner CLEC does, and MCI or its partner CLEC would be responsible for testing and repairing the splitter and for coordinating such activities between themselves to minimize service disruption.

The Commission concludes that MCI's proposed language would inappropriately force SBC to police the relationship between two partnering CLECs, when that should be the CLECs' responsibility. The manner in which the two line splitting CLECs interact in response to their shared customer's service issues is a subject that should be resolved between those two CLECs – not between SBC and one of those CLECs.

The record also demonstrates that MCI's proposed process would also be burdensome and virtually impossible to administer. SBC's OSS are designed to support trouble reporting for the UNEs actually provisioned by SBC, and in the manner in which they are provisioned. Thus, SBC currently uses the same standard reporting process for a UNE regardless of whether it is used in a line splitting arrangement. MCI's proposal, however, would require SBC to create different trouble reporting processes for a single UNE, depending on whether the UNE is used in a line splitting arrangement or not.

MCI also raises the possibility that, under SBC's proposed language, it might submit two trouble tickets (one for the loop and one for the switch port), and asserts that other ILECs have implemented a single ticket process. The Commission finds that MCI's speculation does not support MCI's proposed language, and provides no reason to reject SBC's.

First, the record demonstrates that MCI would not need to submit multiple trouble tickets if it would simply train its personnel to handle trouble tickets appropriately. In many cases, the nature of the trouble will identify the location of the trouble (the loop or the switch), and MCI's personnel should be able to submit the appropriate trouble ticket.

Second, a CLEC engaging in line splitting has physical access to the UNE in question, and should be able to isolate the trouble itself before submitting the trouble ticket.

Third, the fact that other ILECs may have developed a different process than that used by SBC, as MCI asserts, is irrelevant. The evidence demonstrates that SBC's trouble ticket process is consistent with the manner in which unbundled network elements are provisioned and inventoried in SBC's systems. Implementing the kind of change suggested by MCI's witness (though not, the Commission notes, actually proposed by MCI in its proposed contract language) would require a major overhaul of the manner in which SBC provisions and inventories unbundled network elements in a UNE Line Splitting scenario. In addition, SBC would need to manually identify all existing UNE Line Splitting arrangements, with the assistance of all CLECs currently engaging in line splitting, and update the manner in which the embedded base is inventoried. From a cost/benefit perspective, MCI has not even tried to show that it would be efficient, rational, or reasonable to undertake such an enormous enterprise merely to eliminate the possibility that MCI might occasionally submit two trouble tickets instead of one.

LINE SPLITTING ISSUE 7:

SHOULD SBC ILLINOIS' MECHANIZED LOOP TESTING BE LIMITED TO WHEN MCI IS LEASING THE ULS-ST UNE IN A LINE SPLITTING ARRANGEMENT?

ICA Reference: Line Splitting § 8.6.1

This issue concerns access to SBC's legacy Mechanized Loop Testing ("MLT") system. SBC has agreed to provide access to the MLT, but only where MCIm is leasing unbundled Local Circuit Switching in a Line Splitting arrangement. The Commission approves SBC's proposed language, and concludes that MCI's objection to this limitation is without merit.

SBC's proposed limitation is necessary as a practical, operational matter. The evidence establishes that MLT is a function of the switch. Thus, if MCI is not using SBC's switch, SBC has no way to provide MLT to MCI. Nor, as an operational and technical matter, can SBC provide OSS support for the network elements of another carrier – in this case, another carrier's switch.

Moreover, the Commission notes that when MCI is providing its own switch, it can utilize the testing capabilities of its own switch. And if MCI is using the switch of a partnering CLEC, then MCI can work out an arrangement with that CLEC to obtain operational support and access to the CLEC's switch functions, including testing.

LINE SPLITTING ISSUE 8:

WHAT TERMS AND CONDITIONS SHOULD APPLY FOR LINE SPLITTING TURN-UP TEST?

ICA References: Line Splitting §§ 2.7, 10 (all)

MCI proposes to apply to line splitting the line sharing turn up test that appears in other contracts between the parties with respect to line sharing. The Commission rejects MCI's proposal.

As the Commission explained above (Line Splitting Issues 1, 4, and 6), line splitting is not the same as line sharing. Thus, the voluntary turn up procedures that SBC developed for the line sharing context, where SBC and one CLEC jointly provide voice and data service, are not appropriate for the line splitting context, where two CLECs jointly provide voice and data service. MCI is inappropriately attempting to avoid responsibility for managing its own CLEC-to-CLEC line splitting relationships, by transferring such responsibility upon SBC.

MCI's proposal would require SBC to develop and document new testing procedures for line splitting. The Commission finds that MCI has failed to prove the necessity for new procedures, and SBC's current testing procedures are adequate.

The Commission further finds that, contrary to MCI's suggestion, SBC is not attempting to avoid any testing in the line splitting context. As the Commission explained above with

respect to Line Splitting Issues 1 and 6, line splitting is not a UNE, but is an activity or arrangement that CLECs may engage in using UNEs. Accordingly, when MCI is using UNEs to engage in line splitting, SBC should, as SBC has proposed, comply with the ordinary testing procedures that apply to those UNEs. In particular, SBC tests to ensure (and its proposed contract language guarantees MCI) that it provisions an xDSL loop with continuity and pair balance. Moreover, SBC has two separate, voluntary testing offerings for xDSL loops – Acceptance Testing (at the provisioning phase) and Cooperative Testing (at the maintenance phase). These testing offerings are available to MCI whenever it leases an unbundled xDSL loop, whether MCI uses the loop to engage in line splitting or not.

Further, SBC has proposed additional language specific to line splitting. The Commission approves SBC's proposed language. SBC's proposed section 10.1 of the Appendix Line Splitting provides that SBC "will visually inspect all Central Office cross connects places in association with Line Splitting orders," and "will verify that the correct telephone number from the UNE Switch Port is appearing at the cable pair associated with the xDSL Loop." This language requires that the testing described be provided regardless of whether MCI chooses to request Acceptance or Cooperative Testing.

LINE SPLITTING ISSUE 10:

SHOULD SBC ILLINOIS' PROPOSED RESERVATION OF RIGHTS AND INTERVENING LAW LANGUAGE SET FORTH IN APPENDIX XDSL BE CROSS-REFERENCED IN THIS APPENDIX LINE SPLITTING?

ICA Reference: Line Splitting § 13

Issue Line Splitting 10 (and Issues xDSL 6 and Line Sharing 10) concern reservation of rights language proposed by SBC. The Commission approves SBC's proposed language. Contrary to MCI's suggestion, SBC's proposed language is not "self serving," but is reciprocal in nature and reserves each party's rights under the *TRO*, the D.C. Circuit's *USTA* decisions, and other relevant law. The Commission concludes that this language is appropriate in order to properly implement the requirements of the FCC's orders and regulations.

Moreover, the Commission notes that the language proposed by SBC is specific to xDSL loops, line sharing, and line splitting. The FCC rules governing these matters have been subject to various changes, and SBC's language would ensure that the relevant appendices may be modified as necessary to reflect applicable law. SBC's language will minimize the need for CLECs that do not provide DSL over xDSL loops or the HFPL to re-negotiate language if pertinent FCC requirements change. Further, the Commission finds that SBC's language simplifies the process by which such changes are incorporated into the interconnection agreement – if there is no dispute regarding the effect of the change, the change will become effective shortly after notice is given. SBC has thousands of interconnection agreements, and in many cases the sheer amount of work required to negotiate and amend those agreements may make it difficult to implement changes in FCC requirements. SBC's language eliminates work where it is not needed, by allowing such changes to take effect quickly if the parties do not have a dispute.

The Commission does not agree with MCI's assertion that SBC's language is unilateral. If there is a dispute regarding the effect of a change in FCC requirements, that dispute will be addressed in accordance with the agreement's standard dispute resolution provisions. SBC's language helps to prevent parties from engaging in delaying tactics to maintain the status quo – and thereby "unilaterally" preventing implementation of new federal requirements – while providing both parties protection if there is disagreement regarding the effect of those new requirements.

LNP ISSUE 3: WHICH PARTY'S TERMS AND CONDITIONS FOR COORDINATED CUTOVERS SHOULD BE INCLUDED IN THE AGREEMENT?

ICA Reference: LNP § 5; Appendix Coordinated Hot Cut (CHC)

The parties disagree on what language should govern hot cuts and where that language should appear in the Agreement. SBC proposes a separate appendix outlining its obligations, while MCI proposes language in the LNP appendix. Staff supports SBC's proposal, subject to a modification that SBC is willing to make. We adopt SBC's proposal, modified as proposed by Staff.

The basic facts are undisputed: When an end user switches service from SBC to a CLEC and retains its existing telephone number (*i.e.*, ports its number), both carriers must make changes in their networks to physically switch the service. When the existing loop facility will be reused, this switch may be performed via either a coordinated hot cut ("CHC") or a non-CHC cutover. Under the basic, non-CHC, process, the CLEC specifies the start time for the number to be ported, but SBC does not coordinate with the CLEC prior to performing the service cutover. Under the CHC process, SBC not only performs the basic work to switch the service, but also coordinates with the CLEC and does not remove the switch translations from the SBC donor switch until it receives the CLEC's instruction to do so. SBC thus takes extra time and effort to ensure minimal or no service interruption to the end user. SBC's proposed CHC appendix describes this service offering.

MCI offers two general criticisms of SBC's proposal. First, it asserts that SBC could use the appendix as justification for billing additional and unwarranted amounts. Second, MCI argues that the appendix inappropriately gives SBC the ability to change mutually agreed upon scheduling.

Staff witness Liu concluded that MCI's first criticism is unfounded, because SBC is entitled to be compensated for the extra work it performs when MCI requests a Coordinated Hot Cut. Dr. Liu also pointed out that the Commission addressed the same issue in the recent SBC/AT&T arbitration, Docket No. 03-0239, and held that SBC should be compensated for the extra work pursuant to SBC's FCC Access Tariff No. 2.

Dr. Liu also found that giving SBC the right to suspend, under certain conditions, a mutually agreed upon schedule for cutovers was reasonable, but recommended that the CHC

appendix contain explicit language giving MCI the same right. SBC agrees with this recommendation and has proposed additional language to address Dr. Liu's concern.

MCI asserts that its proposal would ensure that customers' service is not disrupted, but we do not see that benefit in MCI's proposal. Rather, it appears that MCI's proposal would deny the parties flexibility in dealing with unexpected high work levels and thus could lead to service disruptions. Moreover, SBC witness Chapman pointed out that MCI's proposal does not accurately reflect the companies' current cutover practices. MCI offered no rebuttal to these criticisms; it also suggested no reason why the Commission should ignore its own decision in No. 03-0239.

Accordingly, we accept Staff's recommendation that the Commission follow the AT&T Arbitration Decision and adopt SBC's proposed CHC appendix, subject to the modification described above.

NGDLC ISSUE 1: 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?

ICA Reference: Appendix NGDLC (all)

MCI proposes an Appendix Next Generation Digital Loop Carrier (NGDLC) that addresses the unbundling of SBC's NGDLC "Project Pronto" architecture, including access to unbundled packet switching. While MCI asserted that its language should be approved because it is inconsistent with the Commission's prior Order in Docket No. 00-0393, the Commission has since modified that order on re-opening. The Commission's modified order makes clear that, pursuant to the *TRO*, SBC is not required to unbundle its Project Pronto architecture. Thus, the Commission rejects MCI's proposed Appendix NGDLC.

The Project Pronto DSL architecture consists of loops containing both copper and fiber optic cable (copper from the customer premises to a remote terminal, and fiber from the remote terminal to the central office), and NGDLC equipment, deployed in the remote terminal and central office, that is used to provide packet switching functionalities. The FCC addressed the unbundling of such facilities in the *TRO* and held that ILECs are not required to unbundle packet switching or the packet switching capabilities of next generation networks, including the broadband capabilities of hybrid loops. MCI's proposed Appendix NGDLC is inconsistent with that FCC holding.

In the *TRO* (¶ 538), the FCC concluded "that a wide range of competitors are actively deploying their own packet switches" – which are "much cheaper to deploy than circuit switches" – in large numbers to "serve both the enterprise and mass markets." Indeed, "several carriers maintain their own frame relay and ATM networks with AT&T, WorldCom, and Sprint each operating extensive, nationwide networks." Thus, the FCC concluded (¶ 537) "on a national basis, that competitors are not impaired without access to packet switching," and "decline[d] to unbundle packet switching as a stand-alone network element." The FCC also stated (¶ 541) that "[i]n order to ensure that both incumbent LECs and competitive LECs retain

sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches, we find that requiring no unbundling best serves our statutorily-required goals."

The FCC also held (¶ 540) that ILECs are not required to unbundle "the packet switching functionality as it exists in DLC [digital loop carrier] systems that are deployed in the loop plant to provide multiplexing, switching, and routing functionalities between the customer premises and the central office." The FCC defined "hybrid loops" as "local loops consisting of both copper and fiber optic cable (and associated electronics, such as DLC systems)" *id.* n.832), and held that ILECs are not required to "unbundle the next-generation network, packetized capabilities of their hybrid loops." *Id.* ¶ 288. Thus, the FCC held, "[t]he 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." *Id.*

Moreover, the FCC held that ILECs are "not require[d] . . . to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops," including "the xDSL-capable line cards installed in DLC systems." *Id.* In short, as the FCC's final rules state, "[a]n incumbent LEC is not required to provide unbundled access to the packet switched features, functions and capabilities of its hybrid loops." 47 C.F.R. § 51.319(a)(2)(i). In *USTA II*, the D.C. Circuit upheld "the [FCC's] decision not to order unbundling of the broadband capacity of hybrid loops." *USTA II*, 359 F.3d at 582.

The Commission concludes that MCI's proposed Appendix NGDLC not only is inconsistent with and prohibited by this binding federal law, but also is at odds with our order on re-opening in Docket No. 00-0393. In our September 28, 2004 Order on Reopening in Docket No. 00-0393, we determined (at p. 51) that the existing Pronto and HFPL requirements in our prior orders were in conflict with federal law, and found that these may rightly be modified to be consistent with both Illinois and federal law. Thus, the Commission "vacate[d] the requirements in our existing orders that have SBCI offer . . . unbundled access to 'packet switched functions, features and capabilities,'" including the Commission's previous Project Pronto unbundling requirements. *Id.* at 52. Thus, MCI's proposed Appendix NGDLC is not supported by any current Commission requirements, and indeed is contrary to the Commission's determinations in Docket No. 00-0393.

The Commission further concludes that MCI's attempt to require SBC to unbundle the packet switching capabilities of its NGDLC architecture is preempted by federal law. The FCC confirmed the preemptive effect of unbundling determinations like its packet switching and hybrid loop determinations in the *TRO*. The FCC explained that it was adopting a new "policy framework . . . based on carefully targeted impairment determinations," and that "setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers." *TRO* ¶ 187. That national policy framework includes not only the UNEs that "must be unbundled," but "the network elements that must not be unbundled, in any market." *Id.* And "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations" (*id.*), because that would destroy the integrity of this national policy framework. The Project Pronto architecture falls within the category of network elements that the FCC has concluded "must not" be required to be unbundled. The FCC's packet switching rules "*prohibit[]* access to the packet-

based networks of incumbent LECs," thereby promoting the "critical domestic policy objective" of "stimulat[ing] competitive LEC deployment of next-generation networks." *TRO* ¶¶ 212, 290 (emphasis added).

And even if the *TRO* itself were not clear enough, the FCC has made clear in briefs filed after the *TRO* that its packet switching rules have binding, preemptive effect: "In the UNE context, . . . a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. . . . *Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption*." Brief for Respondents [the FCC], Case Nos. 00-1012, *et al.* (cons.) (D. C. Circuit, filed Dec. 31, 2003) at 93 (emphasis added; citations omitted). The FCC gave one example that hits home here: "For example, the [FCC] declined to unbundle the packetized functionality of ILEC loops. A state requirement to reverse that decision would substantially prevent implementation of the Act." *Id.* at 93 n.41.

And it is not just the FCC that has made clear the preemptive effect of federal law in this area. As the Third District Illinois Appellate Court recently held, "Nothing in the [Illinois Public Utilities] Act, even the independent authority for alternative regulation found in Section 13-506.1, gives the Commission the power to controvert federal law." *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, Case Nos. 3-03-0207 & 3-03-0515, *slip op.* at 12 (3d Dist. Sept. 17, 2004) ("*Illinois Bell*"). Thus, MCI's proposed Appendix NGDLC is rejected.

Staff suggested the Commission require the parties to include the Appendix NGDLC in the ICA because it remains consistent with a currently effective order of this Commission. Staff further suggested that the Commission condition the effectiveness of the Appendix upon the results of the re-opened Docket No. 00-0393. However, as noted above, the Commission has now issued its order on re-opening in that Docket, and MCI's proposed Appendix is not consistent with that order. Thus, the Commission will not require the parties to include MCI's language in their interconnection agreement. Nor will the Commission require the parties to include a reference to the Pronto Tariff in their agreement, as Staff suggests in the alternative, given the Commission's holding in Docket No. 00-0393 (at p. 60) authorizing SBC to withdraw the Pronto tariff. Docket No. 00-0393 Order on Reopening at 60.

NIM ISSUE 1: **SHOULD SBC'S DEFINITION OF "ACCESS TANDEM SWITCH" BE INCLUDED IN THE AGREEMENT?**

ICA Reference: NIM § 1.1

NIM ISSUE 3: **SHOULD SBC'S DEFINITION OF "LOCAL TANDEM" BE INCLUDED IN THE AGREEMENT?**

ICA Reference: NIM § 1.7

NIM ISSUE 4: **SHOULD SBC'S DEFINITION OF "LOCAL/ACCESS TANDEM SWITCH" BE INCLUDED IN THE AGREEMENT?**

ICA Reference: NIM § 1.8

NIM ISSUE 6: **SHOULD SBC'S DEFINITION OF "LOCAL/INTRALATA TANDEM SWITCH" BE INCLUDED IN THE AGREEMENT?**

ICA Reference: NIM § 1.11

SBC's definitions of "access tandem switch" (NIM Issue 1), "local tandem switch" (NIM Issue 3), "local/access tandem" switch (NIM Issue 4) and "local/intraLATA tandem switch" (NIM Issue 6) are adopted, for two reasons. First, the definitions accurately describe the type of tandem switches within SBC's network, and MCI does not contest this. Second, for three of the definitions, the terms are used in language agreed to by MCI, and for the other, MCI uses the term in language it proposes. Thus, these terms are necessary to give meaning to important provisions of the NIM Appendix.

MCI does not contend that the definitions proposed by SBC are wrong. Rather, MCI argues that the definitions are not necessary because they are only used in SBC proposed language that MCI disputes. MCI is mistaken. As described above, each of the terms is used in language that is either agreed to, or proposed, by MCI.

NIM ISSUE 2: **SHOULD SBC'S DEFINITION OF "ISP BOUND TRAFFIC" BE INCLUDED IN THE AGREEMENT?**

ICA References: NIM §§ 1.6, 8.1

We adopt SBC's proposal for the reasons set forth in our discussion of Reciprocal Compensation Issues 1b and 1d.

NIM ISSUE 5: **WHICH PARTY'S DEFINITION OF "LOCAL INTERCONNECTION TRUNK GROUP" SHOULD BE INCLUDED IN THE AGREEMENT?**

ICA Reference: NIM § 1.10

This issue goes hand in hand with NIM Issue 19, in which we followed our past precedent and required the parties to establish one set of trunk groups for local/intraLATA toll traffic and another set of trunk groups for access traffic. This separation permits the parties to accurately track and bill jurisdictionally separate traffic. It also permits SBC to efficiently manage network reliability. Issue 5 concerns the definition of "local interconnection trunk group." MCI's proposed definition would permit it to place any type of traffic over a single trunk group (exactly what MCI proposes to do in NIM Issue 19), while SBC's language would limit the local trunk groups to local-type traffic. Essentially, this issue turns on the outcome of NIM Issue 19, which as discussed below, we resolve in SBC's favor.

Staff agrees with our conclusion. Staff witness Qin Liu recommends that "local interconnection trunk group" be defined as proposed by SBC. Staff makes the common sense observation that the definition of "local" interconnection trunk groups should not include non-local traffic such as interLATA and transit traffic.

NIM ISSUE 9: **WHICH PARTY'S DEFINITION OF "POINT OF INTERCONNECTION" SHOULD BE INCLUDED IN THE AGREEMENT?**

ICA Reference: NIM § 1.14

Both SBC and MCI accept Staff's proposed definition of the term "point of interconnection." Therefore, this issue is resolved by our adoption of that definition.

NIM ISSUE 11: **SHOULD SBC'S DEFINITION OF "SECTION 251(b)5 TRAFFIC" BE INCLUDED IN THE APPENDIX NIM OF THE AGREEMENT?**

ICA References: NIM §§ 1.16, 8.1

NIM ISSUE 12: **SHOULD SBC'S DEFINITION OF "SECTION 251(b)5/INTRALATA TRAFFIC" BE INCLUDED IN THE APPENDIX NIM OF THE AGREEMENT?**

ICA References: NIM §§ 1.17, 8.1, 8.5, 9.1, 9.2

The NIM Appendix provides the terms and conditions for establishing interconnection facilities and trunk groups between the parties. Some of those provisions pertain only to specific types of traffic classifications, one of which is specifically intended to be "Section 251(b)(5) Traffic." This classification is used by the FCC in its *ISP Remand Order* and, pursuant to that order, certain compensation obligations attach to this type of traffic. Since the ICA deals with

this type of traffic, we find it appropriate to provide a definition. The term "Section 251(b)(5) Traffic" is discussed in more detail in connection with our resolution of Reciprocal Compensation Issues 1b and 1d.

Similarly, the term "Section 251(b)(5)/IntraLATA Traffic" is used in the ICA and should be defined. This term is an abbreviated form of describing the four types of traffic listed in Section 1.17: (i) Section 251(b)(5) Traffic, (ii) ISP bound traffic, (iii) intraLATA toll traffic originating from an end user obtaining local dial tone from MCI where MCI is both the Section 251(b)(5) traffic and intraLATA toll provider, and/or (iv) intraLATA toll traffic. Each of these traffic types may be delivered over local interconnection trunk groups. We find that the definition SBC proposes here appropriately encompasses those four types of traffic.

Staff supports SBC's proposed definitions, and states they are consistent with the FCC's characterization of traffic. MCI prefers the term "Local Traffic," but Staff correctly points out that this term has been abandoned by the FCC and its further use would create unnecessary ambiguities. We therefore reject MCI's request to use that term.

NIM ISSUE 13: SHOULD MCI BE SOLELY RESPONSIBLE FOR THE FACILITIES THAT CARRY OS/DA, 911, MASS CALLING AND MEET-POINT TRUNK GROUPS?

ICA Reference: NIM § 2.5

We find that SBC's proposed Section 2.5 would make clear that MCI is responsible for providing the facilities that MCI uses to provide telecommunications services to its end users. The facilities in question are: 911 facilities that connect MCI's 911 switch to the Selective Router, so that calls may be forwarded to the proper Public Safety Answering Point; facilities that connect MCI's switch to the Operator Services and/or Directory Assistance Platform provided by SBC; facilities that connect MCI's switch to interexchange carriers (so-called "Meet Point Trunks"); and facilities that connect MCI's switch to an SBC Choke Tandem that restricts or "chokes" the number of calls that can be completed in response to mass calling events such as radio contests or "American Idol"-type shows ("Mass Calling Trunks").

None of these facilities are used to connect calls between an MCI end user and an SBC end user. Rather, MCI uses them to provide services to its own customers. MCI should therefore provide and pay for those facilities. MCI does not explain why SBC should provide a portion of this transport free of charge.

With respect to 911 traffic, MCI has agreed to language in Section 10.2 that obligates it to provide its own "facilities/trunks" between the MCI switch and the Selective Router. Given that, MCI has no basis to dispute Section 2.5 as it relates to 911 facilities because Section 2.5 merely confirms that MCI is responsible to provide its own 911 facilities to the Selective Router.

With respect to OS/DA facilities, the outcome is the same. For example, an MCI end user who wants to use her phone to obtain a number from directory assistance dials 411 and is connected through MCI's network to whatever operator services MCI has contracted with to provide this function. The entire transaction takes place within MCI's network. The fact that

MCI may choose to contract with SBC to provide directory assistance does not entitle MCI to free transport between the MCI switch and the SBC operator that provides directory assistance.

The same is true for "Meet-Point" facilities that connect MCI's switch to interexchange carriers. For example, when an MCI end user also gets local service from MCI but presubscribes her "1+" traffic to AT&T places a long distance call on a "1+" basis, the call is transported from the MCI switch to the AT&T switch. SBC need not be involved in and is not be required to provide transport to MCI in that situation.

SBC's proposed language for Section 2.5 merely serves to make MCI responsible for the transport facilities necessary to provide services to its own end users. SBC has no obligation to provide transport (free or otherwise) in these situations. SBC's language is therefore adopted.

NIM ISSUE 14A: WHERE SHOULD MCI INTERCONNECT WITH SBC IN ILLINOIS?

NIM ISSUE 14B: SHOULD MCI BE REQUIRED TO BEAR THE COST OF SELECTING A TECHNICALLY FEASIBLE BUT EXPENSIVE FORM OF INTERCONNECTION, SUCH AS A SINGLE POINT OF INTERCONNECTION OR A POINT OF INTERCONNECTION OUTSIDE THE TANDEM SERVING AREA?

ICA Reference: NIM § 3

As originally formulated, this issue presented the question whether MCI has the right to choose to interconnect at a single Point of Interconnection ("POI") per LATA and whether, if it has such a right and exercises it, it is obligated to compensate SBC for the excess transport provided between that single POI and all SBC switches outside the local calling area in which the POI is located. As a result of a proposal made by Staff, however, this issue presents another question – whether the ICA should restrict MCI's ability to dismantle the parties' existing POIs at each tandem in certain LATAs.

Initially, SBC proposed language that would have required MCI either to establish a POI at each tandem or, if MCI instead established a single POI per LATA, to compensate SBC for the transport SBC provides in excess of 15 miles between the POI MCI selects and the tandem serving the terminating location. In support of its proposed language, SBC contended, among other things, that the FCC's treatment of interconnection in the *Local Competition Order* suggests that a CLEC should bear the incremental costs caused by its decision to route traffic to distant switches when closer switches are available; that MCI's single POI proposal would create "expensive interconnection" for which MCI should be required to bear the cost; and that MCI's right to elect a single POI does not imply that SBC should bear the additional costs caused by MCI's election. MCI countered SBC's arguments with legal principles that, according to MCI, would permit MCI to establish a single POI per LATA while at the same time prohibiting the Commission from requiring MCI to compensate SBC for any additional transport costs SBC might bear as a result of that election.

SBC noted that MCI's and SBC's networks in Illinois have been interconnected since at least 1997, and that the parties have already established, at substantial cost, multiple POIs per LATA. Given that, SBC contended, all it was really requesting was to preserve the current POIs. In support of its contention that MCI should not be allowed to dismantle those POIs, SBC contended that neither the 1996 Act nor any FCC rule or decision of this Commission precludes a prohibition against the unilateral dismantling of existing POIs. Not only have the parties each invested substantial time and expense to establish these arrangements, but also, as SBC's witness explained, dismantling them would create a point of vulnerability that, in the event of a catastrophic failure at that single POI location, would isolate the parties' networks from one another.

MCI objected to the contract language SBC initially proposed, but did not dispute that the parties' networks are currently interconnected at multiple points in some LATAs.

For its part, Staff recommended that MCI be prohibited from dismantling currently-existing POIs. SBC responded to Staff's recommendation by proposing the following contract language: "The parties acknowledge that, as of the date of this Agreement, MCI has established multiple POIs in several LATAs within Illinois. MCI shall not dismantle a POI without prior agreement with SBC, provided that such prior agreement shall not be unreasonably withheld. Any dispute arising under this provision shall be addressed by the dispute resolution provisions of this Agreement."

MCI objected to Staff's recommendation, but for reasons we find unpersuasive. Indeed, MCI witness Ricca substantiated the concerns of SBC and Staff when he acknowledged that establishing a POI requires significant investment. Mr. Ricca also in effect acknowledged that MCI would not be harmed by Staff's proposal, because MCI has little incentive to decommission active POIs and, in fact, evidently has no plans to do so. Mr. Ricca indicated that dismantling a POI would be appropriate if SBC's transport rates increase, but that is not a basis for rejecting the language SBC proposed in order to implement Staff's recommendation, because that language provides for dispute resolution in the event that MCI proposes to dismantle a POI and SBC does not agree. If the situation that MCI hypothesizes (*i.e.*, a dramatic increase in SBC's transport rates that might justify dismantling a POI) ever arises, SBC's language will enable the parties to address the situation appropriately.

NIM ISSUE 15: SHOULD MCI BE REQUIRED TO TRUNK TO EVERY TANDEM IN THE LATA?

ICA References: NIM § 3.3 *et seq.*, 8.7, 8.8

SBC proposes language in Sections 8.7 and 8.8 that would require MCI to establish trunks (not facilities) to each tandem in a LATA. MCI opposes this language and proposes language in Section 3.3 that would permit it to bring all of its trunk groups to a single tandem. SBC contends that MCI's approach would be wasteful of trunks and wasteful of tandem capacity. Staff generally agrees with SBC, but proposes a modification to SBC's language, which SBC opposes.

A tandem switch connects multiple end office switches. Where there is enough traffic to justify it, trunks may directly connect one end office switch to another. But there is not always enough traffic between two end offices to justify such an arrangement, so end offices often connect to tandem switches is what can be described as "hub and spoke" arrangement. A tandem switch has a finite capacity. At about 100,000 trunks, a tandem reaches its limit and another tandem has to be deployed. Installation of a new tandem costs SBC between 10 to 15 million dollars, and also imposes additional cost on the entire industry because all carriers using the tandems must establish additional connections to route into the new tandem. In addition, each successive tandem adds less new tandem capacity to the system than its predecessor did, because new tandems must connect to all other tandems. The more tandems there are in an area, the more trunks are required to connect them to each other and fewer trunks are available for additional traffic. These tandem to tandem connections can use up to 60% of the available trunk ports in a tandem.

We agree with SBC that MCI's proposed language could result in premature tandem exhaust. When switches such as MCI's have a large amount of dedicated traffic to several tandems, routing all traffic through a single tandem is extremely inefficient. Using any tandem ties up two trunks - the one coming in from MCI and the one going out to an end office or another tandem. If the outgoing trunk group routes a call to another tandem to get to another end office (the other tandem MCI should have routed to), two trunks will be used through that office. With this type of routing, a call that could have been handled directly between MCI and an SBC tandem uses four SBC trunk terminations (into and out of the first tandem, and into and out of the second tandem) instead of just two.

SBC's concern over tandem exhaust is not conjectural. As recently as 1996, the Chicago LATA was adequately served by three tandems. The number today is 14 tandems, and without tandem relief, four additional tandems will exhaust by 2007. SBC's proposal minimizes tandem exhaust by asking that MCI provision trunk groups to each SBC tandem in a LATA, as other CLECs in Illinois do and as MCI does today.

Staff agrees that MCI should establish separate trunks to each SBC tandem in the LATA. Staff, however, recommends that MCI only be required to establish separate trunk groups to a tandem if it has more than one DS1 worth of traffic to that tandem. Staff, however, is applying a standard that the Commission established for direct end office trunking to the different situation of tandem trunking. Staff's exception would still require SBC to "double tandem" calls for any CLECs that falls below that proposed traffic threshold, perpetuating the very inefficiencies and risk of tandem exhaust that Staff proposes to alleviate. Accordingly, we adopt SBC's proposal as is.

NIM ISSUE 16: WHEN IS MUTUAL AGREEMENT NECESSARY FOR ESTABLISHING THE REQUESTED METHOD OF INTERCONNECTION?

ICA References: NIM §§ 2.2, 4.4.1, 4.4.4.3, 4.5.1

A fiber meet arrangement is one method of interconnection. Typically, each party provides a Fiber Optic Terminal ("FOT") at its location and then provides fibers between its

switch and the FOT at the other carrier's location. Issue 16 asks whether MCI can require SBC to construct these fiber facilities anywhere within the LATA. SBC and Staff argue that MCI may not do so, and we agree.

For areas that are not served by SBC's fiber, SBC should be allowed to participate in the decision whether an investment in fiber is prudent. Thus, when MCI chooses a POI that is not on existing SBC fiber, the ICA should require MCI to do one of two things: (1) use a different fiber meet architecture where MCI uses its own fiber to reach a spot where SBC has embedded fiber, or (2) place both sets of fiber at the same time.

MCI would have us believe that its right to interconnect with SBC at any feasible point with the carrier's network requires SBC to construct new facilities to whatever point MCI may designate. It does not. That language by its terms requires the interconnection to be "within" SBC's network, meaning within its existing facilities. It is true that Paragraph 553 of the *Local Competition Order* may describe a very limited exception, but this applies only to a "limited build-out of facilities" as "an accommodation of interconnection." There is nothing "limited" about MCI's proposal. Rather, it is an open-ended obligation that would require SBC to construct facilities anywhere within the LATA-even outside of SBC's operating territory.

Moreover, MCI has already established fully operational points of interconnection at each of the 14 tandems in the Chicago LATA. Given this, it is difficult to understand why MCI insists on the ability to establish additional POIs at locations where SBC does not already have fiber facilities. Indeed, MCI's position is internally inconsistent. In NIM Issue 14, MCI insists it should be permitted to dismantle existing POIs so that it would be left with only a single point of interconnection. Here, MCI argues it needs the ability to establish additional POIs.

We find the arguments MCI presented in its Rebuttal Testimony without merit. First, MCI argues it is entitled to entrance facilities at TELRIC-based prices under the interconnection provisions of Section 251(c)(2). For the reasons discussed in connection with our resolution of NIM Issue 17 and the Commission's September 9, 2004, XO Arbitration decision (Docket 04-0371, at 78), we find that MCI is wrong. Also, MCI argues that Staff's recommendation cannot be reconciled with Paragraph 198 of the *Local Competition Order*. Specifically, MCI asserts that the sole limitation on its ability to designate a point of interconnection is "technical feasibility," without regard to whether the designated point of interconnection is "within" SBC's network and without regard to whether SBC would have to construct facilities to reach that point. The technical feasibility standard, however, does not require SBC to extend its fiber facilities to any point of MCI's choosing.

Staff correctly recommends that we reject MCI's position because MCI's language would obligate SBC to interconnect at points that are not within SBC's network and would require SBC to provide interconnection facilities – an obligation beyond the scope of Section 251(c)(2). The Commission will follow the recommendation of SBC and Staff and adopt SBC's proposed language for all the disputed sections under NIM Issues 16 and 18.

NIM ISSUE 17: **SHOULD FACILITIES USED FOR 251(c)(2) INTERCONNECTION BE PRICED AT TELRIC RATES?**

ICA Reference: NIM § 4.3.1(iii)

MCI claims it is entitled to TELRIC pricing for interconnection facilities that connect MCI's switch to SBC's network. Although MCI bases its claim exclusively on Section 251(c)(2) (the "interconnection" obligation), it is important to note that the FCC in the *TRO* unambiguously held that facilities used to connect an ILEC network with a CLEC network ("entrance facilities") are not unbundled network elements under Section 251(c)(3) (the portion of Section 251 that deals with "unbundled access") and therefore need not be provided at TELRIC rates.

MCI argues that, since the entrance facilities in question interconnect the two networks, SBC is required to provide them at TELRIC rates under the interconnection provisions of Section 251(c)(2). MCI is mistaken. As we just ruled in the XO Arbitration (Docket 04-0371), at 78, CLECs are not entitled to entrance facilities at TELRIC rates under 251(c)(2).

Staff supports this outcome. Both SBC and Staff correctly point out that the interconnection obligation under Section 251(c)(2) extends only to the physical linking of networks; it does not obligate an ILEC to provide facilities to connect the networks. In other words, the only obligation in Section 251(c)(2) is to provide "interconnection," namely, the "linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic," 47 C.F.R. § 51.5.

We find that MCI's position has no support in the language of Section 251(c)(2) or in the FCC's rules and has been explicitly repudiated by this Commission. MCI's proposed language for Section 4.3.1 is rejected.

NIM ISSUE 18A: **SHOULD MCI BE REQUIRED TO INTERCONNECT ON SBC'S NETWORK?**

NIM ISSUE 18B: **SHOULD THE FIBER MEET DESIGN OPTION SELECTED BE MUTUALLY AGREEABLE TO BOTH PARTIES?**

ICA References: NIM §§ 4.4.1, 4.4.4.3, 4.4.4.3.1, 4.4.4.3.2

NIM Issue 18 is fully addressed in our resolution of NIM Issue 16.

NIM ISSUE 19: **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 PART USING INTERNET PROTOCOL?**

ICA References: NIM §§ 7.1.1, 7.1.1.1

MCI sends different types of traffic to SBC for which SBC generally charges two different rates: "access" traffic is billed at tariffed access rates; "251(b)(5)" traffic is billed at reciprocal compensation rates. NIM Issue 19 raises the question whether MCI, like all other CLECs, should continue to send these two types of traffic to SBC over separate trunk groups. MCI proposes language in Section 7.1.1 and 7.1.1.1 that would permit it to combine local/intraLATA toll traffic with interexchange "access" traffic on a single trunk group. SBC opposes this language and requests that the Commission follow its long-established precedent requiring carriers to establish separate trunk groups for jurisdictionally distinct traffic. We find that nothing has changed since the last time the Commission visited this issue in the AT&T arbitration in August, 2003 (Docket 03-0329, at 151-154). There, we rejected AT&T's attempt to combine all traffic on a single trunk group. We reach the same conclusion here.

Separate trunking is needed for the accurate tracking and billing of traffic exchanged between the carriers because it permits SBC to distinguish between access traffic and Section 251(b)(5) traffic. This issue has received heightened attention due to recent accounts of carriers attempting to avoid access charges by the improper routing of access traffic over local interconnection trunk groups to take advantage of the lower reciprocal compensation rates.

Moreover, MCI has already agreed to the principle embedded in our conclusion. In Sections 9.1 and 9.2, MCI and SBC have agreed to language that requires the segregation of local/intaLATA from access traffic for meet point trunking. Section 9.1 provides that: "IXC-carried intraLATA and interLATA toll traffic shall be transported between MCIm's Central Office and SBC Illinois' Access Tandem over a "Meet Point" Trunk Group separate from ***Local and IntraLATA Toll*** **Section 251(b)(5)/IntraLATA Traffic**." While there remains a disagreement over the term that should be used to describe "Section 251(b)(5) traffic," that dispute does not detract from the fact that MCI has already agreed that separate trunk groups should be established for different types of traffic, at least in the area of meet point trunking. The same principle applies to all trunking under the ICA.

Staff agrees. Staff witness Dr. Liu carefully reviewed and rejected each of MCI's arguments, which boil down to two assertions. First, MCI argues that reciprocal compensation and access charges should be "equalized" so that SBC has no need to distinguish "access" traffic from "Section 251(b)(5)" traffic. We agree with Staff that this issue is well outside the scope of the arbitration and requires no further discussion. Second, MCI claims that SBC can adequately bill traffic based upon "jurisdictional factors" – a position that this Commission has consistently rejected.

In his Supplemental Rebuttal, Mr. Price raises four criticisms of Dr. Liu's position, but we find them all without merit. The first criticism is that Dr. Liu appears to believe that the

network efficiencies discussed by Mr. Price "only would inure to the benefit of MCI." This mischaracterizes Dr. Liu's testimony. She did not testify that only MCI benefits. Rather, she testified that Mr. Price's attempt to engage in a cost-benefit analysis on this issue was not supported by evidence.

The second alleged "error" is that Dr. Liu does not acknowledge that the parties will exchange Calling Party Number ("CPN") information pursuant to the Reciprocal Compensation Appendix. But, Mr. Price did not make that argument in his direct testimony, so it is hardly fair to criticize Dr. Liu for failing to address it in her response. More to the point, Mr. Price overstates the usefulness of CPN because it is not available in all cases. The parties acknowledge that CPN is not available on all calls (see MCI's proposed language in Reciprocal Compensation section 3.2), and that will be more and more true as VoIP traffic grows because such traffic is often "geographically indeterminate."

Finally, MCI claims there is an inconsistency in SBC's position when, on the one hand, it notes MCI's under-utilization of interconnection trunk groups and, on the other, raises concerns regarding tandem exhaust. We find there is no inconsistency. As Mr. Albright explained at hearing, a CLEC that efficiently uses its interconnection trunks will not be able to reduce the total number of trunks merely by combining its local/intraLATA toll with its access traffic. For example, if a CLEC fully utilizes 24 trunks to carry its local/intraLATA traffic and 24 additional trunks to carry its access traffic, it will still require 48 trunks, even if it is permitted to combine all of that traffic over a single trunk group. If a CLEC is *not* efficiently utilizing its trunks (like MCI), the CLEC can gain efficiencies – and reduce the number of trunks –merely by more efficiently utilizing its local/intraLATA trunks, on the one hand, and its access trunks, on the other. In this situation, it is not necessary to combine trunk groups in order to realize efficiencies. Such efficiencies are there for the taking, even while maintaining the jurisdictional separation of traffic between local/intraLATA trunks and access trunks.

For all these reasons, the Commission adopts SBC's language that preserves the status quo in Illinois in which local/intraLATA toll traffic is placed on trunk groups separate from access traffic. This includes SBC's proposed language for Sections 1.10 and 7.1.

NIM ISSUE 20: **EXCEPT WHEN THE CLECS SELECTS AN EXPENSIVE FORM OF INTERCONNECTION, SHOULD EACH PARTY BE FINANCIALLY RESPONSIBLE FOR THE FACILITIES ON ITS SIDE OF THE POI?**

ICA References: NIM §§ 8.6, 8.6.1, 8.6.2

MCI proposes a new intercarrier compensation charge which it calls the "relative use factor" or "RUF." We find that there is no precedent or justification for this charge and it is rejected.

A typical method of interconnection is for each party to provide its own *facility* (*e.g.*, a DS1 or DS3) to a POI, after which each party provisions a two-way trunk group in the switch on its side of the network. MCI's proposal does not focus on the physical interconnection facility – it agrees that each party is responsible to provide facilities on its side of the POI. Rather, MCI

suggests that the cost of providing the trunk ports should be allocated among the parties based on "relative use" so that the party that *receives* the most traffic would be able to bill the originating party for a portion of its trunk (*i.e.*, switch port) costs.

There are several reasons why we reject MCI's proposal to establish a new compensation charge. First, as SBC explains, each carrier must provision a "trunk" on its switch to establish an end-to-end call path. If just one carrier does so, no call path is created and no call can be complete. Therefore, trunk provisioning is always equivalent between the carriers and there is no reason why one carrier ought to charge the other.

Second, MCI's intent appears to be the creation of a new revenue stream by allowing the carrier that is on the receiving end of more traffic to charge the originating carrier. Since MCI receives more traffic from SBC than it originates (due to high ISP-bound traffic) the effect of this scheme would be to allow MCI to charge SBC for MCI's trunks. While this might benefit MCI in the short term, the Commission must consider the consequences it would have on all other carriers since it would be equally applicable to other CLECs.

Third, MCI already assesses a reciprocal compensation charge that recovers "transport and termination" on its network and which includes the cost of trunk port usage. This attempt to impose another charge for use of its trunk ports is merely an attempt at double recovery.

Fourth, the proposal is ripe for abuse because nothing would prevent MCI from installing more trunks than needed, and then charging for those trunks. Evidence adduced elsewhere in this proceeding shows that MCI has an extraordinarily low utilization rate for the trunks it has provisioned. MCI's proposal would permit it to charge SBC for those trunks whether or not they are efficiently utilized.

Fifth, the FCC is undertaking a comprehensive review of existing intercarrier compensation rules in its Intercarrier Compensation NPRM. We will not interfere with that effort by creating new intercarrier compensation obligations in the interim.

NIM ISSUE 21: **SHOULD MCI BE REQUIRED TO ESTABLISH A MEET-POINT TRUNK GROUP TO EACH SBC-13 STATE LOCAL-ACCESS OR ACCESS TANDEM SWITCH WHERE MCI HAS HOMED ITS NXX CODES?**

ICA Reference: NIM § 9.4

SBC states that it is satisfied with the agreed-upon language on this issue as it exists and therefore withdraws its proposed language for NIM Section 9.4. Therefore, the Commission need not address this issue.

NIM ISSUE 22: SHOULD EACH PARTY BE REQUIRED TO BEAR THE COST OF TRANSPORTING FX TRAFFIC FOR THEIR END USERS?

ICA Reference: NIM § 9.5

We find that there is a class of calls for which it is particularly appropriate that MCI bear the expense of transporting outside a local calling area. These are "Foreign Exchange" or "FX" calls, which are dialed as local calls but are really toll calls because they are directed to a party outside the local calling area. SBC does not (and cannot) charge its own customers for these calls, and so would bear the entire expense of the transport facilities the calls employ if it is not permitted to charge MCI. In Section 9.5, SBC requests that MCI be "solely responsible to transport traffic between its foreign exchange service customer" and the location where the call originates. SBC's language is adopted for several reasons:

First, MCI does not have just one point of interconnection with SBC's network. Rather, it has at least fourteen POIs dispersed throughout the Chicago LATA. If this were simply a matter of physical interconnection, MCI would instruct SBC to deliver traffic to MCI at the POI closest to the point of origination. Instead, SBC must transport traffic further away than the nearest POI. This cannot be explained by any requirement of the physical interconnection arrangement. Rather, the sole explanation is that MCI prefers "free" transport.

Second, the SBC proposal is consistent with the well established rule that the "cost causer" should pay. We recognize that the most efficient allocation of economic resources can only occur when users of a service pay for it.

Third, SBC is not asking MCI to provide all of its own transport, just that in excess of 15 miles (the distance that SBC would provide for truly local calling). And SBC is not asking that MCI make any changes in its retail service. MCI can still provide FX service wherever and to whomever it likes and SBC is not attempting to dictate any particular network configuration for MCI.

Staff acknowledges that FX traffic is toll traffic, but contends that SBC's concerns regarding the delivery of this toll traffic would be alleviated if SBC prevails on NIM Issue 15. We disagree. NIM Issue 15 concerns only the provision of trunking – not the transport facilities that are at issue here. In order to address SBC's concerns, MCI should provide its own transport or should pay SBC to provide transport for FX calls carried on SBC's network in excess of 15 miles.

In summary, while SBC should be compensated for the excess transport it provides in all cases, FX calls present a special case because in reality, it is SBC toll traffic for which SBC can no longer bill. The point is not that SBC has lost toll revenue. SBC is entitled to recover its costs of providing transport to MCI on these calls. For these reasons, the Commission adopts SBC's proposed language for NIM Section 9.5.

NIM ISSUE 24: **SHOULD FACILITIES USED FOR 911 INTERCONNECTION BE PRICED AT TELRIC RATES?**

ICA References: NIM §§ 10.2, 10.3, 10.8, 10.10, 10.12

This issue is the same as NIM Issue 17, and like Issue 17, we resolve it in SBC's favor. Staff agrees with this conclusion.

The transport at issue here connects MCI's switch to the Selective Router in the 911 tandem office, which in turn connects MCI's end users to the public safety answering points that respond to 911 calls. MCI's argument that these are "interconnection" facilities under Section 251(c)(2) is the same argument MCI advances to avoid the *TRO's* ruling on entrance facilities in NIM Issue 17 (where MCI argues that entrance facilities are "interconnection" priced at TELRIC) and in SS7 Issues 1, 2 and 3 (where MCI argues that SS7 links are "interconnection" priced at TELRIC). MCI is wrong for all of the reasons explained in our resolution of Issue 17, the most prominent of which is the Commission's recent ruling in the XO Arbitration (Docket No. 04-0371, at 78). There, we rejected XO's argument that Section 251(c)(2) allows a CLEC to purchase at TELRIC rates any facility used for "interconnection."

NIM ISSUE 25: **WHAT SHOULD THE POINT OF INTERCONNECTION FOR 911 BE?**

ICA Reference: NIM § 10.7

This issue concerns the location of the point of interconnection for 911 traffic. This is one aspect of the issue presented in NIM Issue 13, and for all the reasons set forth there, the Commission finds that MCI is responsible for transporting 911 traffic to the Selective Router in the 911 tandem office, rather than handing it off to SBC at some intermediate location. In NIM Issue 13, we explained two critical facts.

First, MCI has already agreed to provide trunking and facilities directly to the Selective Router in Section 10.2. Since MCI has already agreed to provide and pay for the facilities to the Selective Router, it cannot be allowed to evade that responsibility by the language it proposes in Section 10.7.

Second, 911 traffic is different than ordinary voice traffic exchanged between MCI and SBC. SBC does not charge MCI for transport and termination (*i.e.* reciprocal compensation) of 911 traffic, so SBC is not otherwise compensated for providing the transport MCI seeks. Moreover, the 911 transport facilities in question are used by MCI exclusively to provide 911 capability to its own end users. SBC should not be required to provide free transport to assist MCI in providing basic telecommunications capabilities to its own end users.

Accordingly, the Commission adopts SBC's proposal for Section 10.7.

NIM ISSUE 26: **WHAT TERMS AND CONDITIONS SHOULD APPLY FOR INWARD OPERATOR ASSISTANCE INTERCONNECTION?**

ICA References: NIM §§ 12.2.1, 12.2.2

OS/DA Inward Trunk Groups are voice connections between operator service platforms. These connections are established between companies that each provide their own operator services, and they allow operators for one carrier to hand off calls to operators of the other carrier. The question here is whether the ICA should designate the IXC Point of Presence ("POP") as the point at which each party hands off calls requiring inward operator assistance, as MCI proposes. We find that it should not.

If MCI (acting in its capacity as a CLEC) wishes to use the POP established by the interexchange ("IXC") operations of its business, this would be acceptable to SBC (and the Commission) as long as the assets of the CLEC and its IXC remain separately identifiable to SBC so that SBC can continue to maintain separate compensation arrangements between them. If, however, MCI is attempting to use the POP of MCI (acting as an IXC) as the *end point* for transport facilities that are used to reach SBC OS/DA switches, this is not appropriate. SBC has no responsibility to provide transport for free so that an MCI operator can reach the OS/DA operator of SBC.

Moreover, we reject MCI's proposed language because it is not reciprocal. It provides that MCI "may" route calls to the designated IXC POP, but requires that SBC "shall" route calls to the designated IXC POP. SBC's language is preferable because it permits the parties to mutually agree upon the manner in which they will route these calls. Any disagreement can be resolved through the dispute resolution provisions of the ICA.

NIM ISSUE 28: **FOR TRUNK BLOCKING AND/OR UTILIZATION, WHAT IS THE APPROPRIATE METHODOLOGY FOR MEASURING TRUNK TRAFFIC?**

ICA References: NIM §§ 17.1, 18.7

The disputed language in Sections 17.1 and 18.7 raises the question of how best to match the number of trunks connecting two switches to the volume of traffic passing between them. SBC has an established method for making that determination -- a method it applies when the question concerns its own traffic or traffic it exchanges with other CLECs. We find that SBC's method works well, and there is no reason to require SBC to adopt a different method for MCI's trunks. MCI's proposal, on the other hand, could increase the number of trunks that would be required between the parties' switches. MCI's proposal would be expensive and would yield no discernible benefit to either the companies or their end users. MCI's proposal is therefore rejected.

The optimal number of trunks between any two switches is a function of the volume of traffic between them. Network engineers seek to ensure that the number is appropriate for each pair of switches, *i.e.*, that there are enough trunks to support the traffic between those switches

without an unacceptable percentage of call blockage and without having an excessive, non-economic number of trunks.

There are two provisions in dispute. First, in Section 17.1 the parties have agreed upon the "design blocking objectives" for each trunk group type (*e.g.*, 1% blockage on local tandem trunks). They disagree, however, on whether the trunk sizing should be calculated using "time consistent average, busy season, busy hour, (20) day average loads" (SBC's language) or "weekly peak busy hour average" (MCI's language). Second, once trunks are established, the parties agree the trunks should be periodically reviewed to determine if they are underutilized. In Section 18.7, MCI proposes that the capacity to determine underutilization should be based on a "weekly peak busy hour," while SBC believes it should be on a "monthly average basis." On both issues, Staff agrees that the language proposed by SBC should be adopted. We agree with SBC and Staff.

The calculation SBC makes to ensure that an excellent grade of service is offered to its customers is based on a time-consistent "busy hour." In other words, the busiest hour of the day for each trunk group (*e.g.* 3:00 to 4:00 PM or 8:00 to 9:00 PM) is studied for 20 business days. Based on the average traffic loads and information provided in industry-wide traffic tables, SBC then calculates the number of trunks necessary. MCI objects to this methodology because MCI's rapidly changing network loads might mean that SBC's methodology would negatively impact MCI's customers (present and future) by leading to significant blockage of calls.

We find this criticism unfounded for two reasons. First, MCI's proposed "weekly peak busy hour average" covers a shorter interval (one week vs. one month) and is more apt to show fluctuations caused by one time events such as storms. In any statistical model, the larger the sample, the better the accuracy. Second, the uncontested facts show that the trunks currently provisioned between SBC and MCI are nowhere near full, so allegations of potential "blockage" are without basis.

MCI also argues that SBC should have no standing to dictate to MCI its processes and methods. We agree with Staff that is not the issue. Since the trunks in question connect two networks, each party must by definition use the same criteria. Staff's position – with which we fully agree – is that SBC's proposal is time-tested and performs well.

Finally, we find that MCI's argument that the Erlang B tables should be used rather than the "Neal Wilkinson Trunk Group Capacity Algorithms" fails for the reasons set forth in the testimony of SBC witness Albright.

For these reasons, the Commission approves SBC's language for Sections 17.1 and 18.7.

NIM ISSUE 30: SHOULD SBC ILLINOIS BE REQUIRED TO PROVISION TRUNK AUGMENTS WITHIN 30 DAYS?

ICA Reference: NIM § 19.4

The number of interconnection trunks at a POI is not static; rather, the parties periodically add or drop such trunks as needs fluctuate. This requires each party to complete provisioning work on each side of the network. The issue in Section 19.4 is whether the

provisioning intervals for this trunk augmentation activity should be set in stone, as MCI proposes, or should be flexible enough to accommodate unforeseen circumstances, as SBC requests. In particular, SBC proposes that the due date intervals shall be those set forth in the CLEC online handbook, which vary based on the quantity of trunks requested, but generally provide for a 20-business day interval. Staff supports SBC's language and so do we.

MCI's proposal is that the provisioning interval be no longer than 30 days, regardless of any unforeseen circumstances which may prevent either party from augmenting trunk groups. For example, if a strike, vendor shortage or natural disaster prevents a party from augmenting trunks, under MCI's proposal, that party could be in breach of the ICA. Similarly, if one party requests the other to augment hundreds and hundreds of trunks at multiple location on a single order, the other party could be in breach if it cannot process all the work in 30 days. On major projects such as this, great care must be taken to complete the work without error. We find that SBC's proposal is preferable because it recognizes that, in some instances, a hard and fast deadline simply cannot be met. Staff Witness Murray agrees with SBC that the "there are situations where it may take more than 30 days to provision trunk augmentation" and concludes that MCI's 30 day requirement is unreasonable. Staff accordingly recommends that MCI's proposed language be rejected. We agree with SBC and Staff and reject MCI's proposed revision to Section 19.4.

NIM ISSUE 31: **SHOULD A NON-SECTION 251/252 SERVICE SUCH AS TRANSIT CAP S SERVICE BE ARBITRATED IN THIS SECTION 251/252 PROCEEDING?**

ICA Reference: NIM §§ 7.1, 22.1 and Transit Traffic Service Appendix.

Alternative 1

Transit service is not subject to arbitration under Section 252 for the reasons set forth in the Commission's resolution of RC Issue 25.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's Transit Traffic Service Appendix. Transit traffic originates on MCI's network, is handed off by MCI to SBC, and is then handed off by SBC to third party carriers for termination on their network. MCI originates the traffic and remains obligated to compensate the terminating carrier for terminating its end user calls. SBC merely serves as a transport provider between the two networks and does not become financially obligated, either to MCI's end user or to the terminating carrier, for reciprocal compensation. Traffic can move in the opposite direction as well, *i.e.*, from a third party carrier, through SBC's network, for termination on MCI's network.

SBC's Traffic Transit Service Appendix appropriately describes this arrangement and the obligations of each party. Staff agrees that SBC's proposal is reasonable and should be adopted with two modifications. MCI raises several objections to the Appendix; we find that none of those objections has merit.

MCI argues that SBC, rather than the originating carrier, should pay MCI to terminate the call when SBC does not provide the proper call records. This is wrong because there are no circumstances in which SBC should be obligated to pay another carrier's bill. SBC agrees to pass any calling party number ("CPN") information it receives from the originating carrier. We find it is unreasonable for MCI to demand more than that.

MCI also complains that SBC should not require separate trunk groups for transit traffic. SBC's language does no such thing. Section 5.0 ("Transit Traffic Routing"), merely discusses the offices to which MCI should route transit traffic: it does not provide separate trunks for transit. Similarly, Section 6.0 establishes a direct trunking requirement when MCI has enough traffic between it and another carrier to support a DS1 facility. This is not the same thing as establishing separate trunk groups for transit traffic.

MCI complains that SBC's language obligates MCI to hold SBC harmless from liability. We find this is appropriate because SBC should have no liability to third party carriers when it acts as a transit provider on MCI's behalf. MCI – not SBC – is responsible to pay all charges associated with the termination of its traffic.

For these reasons, we adopt the Transit Traffic Service Appendix proposed by SBC. MCI's objections are rejected.

NIM ISSUE 32: SHOULD SBC ILLINOIS BE REQUIRED TO OPEN NXX CODES SERVING EXCHANGES OUTSIDE OF SBC ILLINOIS' INCUMBENT TERRITORY?

ICA Reference: NIM ITR § 24.1; Appendix Out of Exchange Traffic

SBC proposes that a separate Out of Exchange Traffic ("OET") Appendix govern the parties' relationship regarding traffic with exchanges where SBC is not the incumbent carrier. MCI proposes language for the NIM ITR appendix addressing only one aspect of such traffic. We adopt SBC's proposal.

If SBC operates outside its own incumbent territory, it is simply another competitor within the incumbent territory of another LEC. Section 251 of the 1996 Act thus establishes differing obligations for SBC, depending on whether it is functioning as an ILEC or a CLEC. Section 251(c) addresses SBC's obligations with regard to the exchange of local traffic with CLECs within SBC's incumbent territory, while Section 251(a) governs SBC's obligations with regard to the exchange of traffic outside of its incumbent territory. The NIM ITR appendix covers the first situation (CLEC interconnection within SBC's territory), and SBC offers the OET appendix to address the second situation (CLEC interconnection outside SBC's territory). We find that SBC's proposed appendix addresses in a comprehensive manner SBC's rights and responsibilities relating to traffic that originates or terminates with an MCI end user outside of SBC's incumbent territory. We further find that the OET appendix is needed to clarify that SBC's Section 251(c) UNE, collocation, interconnection and resale obligations are not applicable outside of SBC's local exchange area.

MCI proposes language addressing only one aspect of out of exchange traffic (the opening of NPA-NXX codes), and its testimony raises the specter that customers will not be able to complete calls if MCI's language is not approved. We disagree. If MCI has its codes appropriately entered in the Local Exchange Routing Guide, shown to the appropriate serving tandem for the area, SBC will route those calls. Moreover, under Section 4.10 of the OET appendix, SBC agrees to open NPA-NXX codes for non-SBC exchange areas in SBC's tandems and end offices.

NIM ISSUE 33A: **WHAT IS THE PROPER ROUTING, TREATMENT AND COMPENSATION FOR SWITCHED ACCESS TRAFFIC INCLUDING, WITHOUT LIMITATION, ANY PSTN-IP-PSTN TRAFFIC AND IP-PSTN TRAFFIC?**

NIM ISSUE 33B: **IS IT APPROPRIATE FOR THE PARTIES TO AGREE ON PROCEDURES TO HANDLE INTEREXCHANGE CIRCUIT-SWITCHED TRAFFIC THAT IS DELIVERED OVER LOCAL INTERCONNECTION TRUNK GROUPS SO THAT THE TERMINATING PARTY MAY RECEIVE PROPER COMPENSATION?**

ICA References: NIM §§ 25.1, 25.2, 25.3, 25.4 (and Reciprocal Compensation §§ 16, 16.1, 16.2, 16.3)

Consistent with our resolution of Reciprocal Compensation Issue 23, we resolve these issues in favor of SBC.

OS ISSUE 1: **SHOULD SBC ILLINOIS BE REQUIRED TO PROVIDE OS AS A UNE?**

ICA Reference: Operator Services § 2.1.2

The dispute on this issue is identical to the dispute regarding DA Issue 1, and our resolution is the same.

OSS ISSUE 1: **MAY MCI VIEW CUSTOMER PROPRIETARY NETWORK INFORMATION PRIOR TO OBTAINING AUTHORIZATION TO BECOME THE END USER'S LOCAL SERVICE PROVIDER?**

ICA References: OSS §§ 2.5, 2.6, 2.8

SBC proposes that MCI be allowed electronic access to Customer Proprietary Network Information ("CPNI") only after it has obtained authorization to become the end user's local service provider. MCI opposes such an authorization requirement.

As an initial matter, it is important to highlight exactly what is at issue: the ability to obtain *electronic* access to CPNI – not disclosure of CPNI. SBC discloses the end user's CPNI to MCI when MCI has the customer's authorization to view it. At any time, upon written request

and with a CPNI release, SBC sends MCI a paper copy of an end user's Customer Service Record, which includes the CPNI. However, SBC proposes that MCI not be allowed *electronic* access to CPNI until it has authorization to become the customer's local service provider.

MCI has already agreed that it cannot access CPNI electronically until the end user has agreed to switch his service. In particular, in Section 3.2.2.1 of the OSS appendix, MCI has agreed that it "will not access the [CPNI] information specified in this subsection until *after the End User requests that his or her Local Service Provider be changed* to" MCI. As a result, MCI cannot contest the inclusion of language reiterating that obligation in Sections 2.5, 2.6, and 2.8 of the OSS Appendix.

Even putting aside MCI's obvious waiver, the Commission finds that MCI should not have electronic access to CPNI until MCI has moved from a marketing mode to the pre-order phase. The FCC has determined that an ILEC must provide five OSS functions: pre-order, order, provisioning, repair/maintenance, and billing. *See UNE Remand Order* ¶ 425. Marketing activity simply is not among those functions. Indeed, the pre-order function does not begin until a CLEC has obtained authorization to be an end user's local service provider: *i.e.*, the marketing and sales function has been completed. SBC has a duty under 47 U.S.C. § 222(a) to protect the confidentiality of its proprietary information of its customers and the customers of other carriers, which resides in SBC's databases. Providing unfettered electronic access to these systems increases the risk that that confidentiality will be breached.

Moreover, SBC has a legitimate interest in protecting its OSS so that it is not misused for marketing purposes. Without the provisions that SBC proposes, CLECs could abuse the pre-order function by engaging in practices such as data mining and screen scraping. Denying electronic access to CPNI until the CLEC needs access to complete pre-order activity does not compromise the CLEC's legitimate need for customer information, and it appropriately protects SBC's OSS from unlawful searches of proprietary information while the CLEC is still in the marketing mode.

The FCC has made clear in the *CPNI Order* that CLECs are not entitled to use CPNI for marketing purposes. The FCC rejected outright MCI's request that it be allowed to access CPNI while marketing to a potential customer, stating "MCI . . . does not establish how its need for this information during an initial cold call to a potential customer overcomes that customer's privacy interests - especially since there is no existing business relations, making MCI . . . or another similarly situated carrier a third party to the consumer." *CPNI Order* ¶ 101 (footnotes omitted). The agency thus effectively rejected MCI's assertion here that the pre-order phase (during which MCI can access CPNI electronically) includes all activities taking place prior to the time that the order is placed and finalized.

The Commission rejects MCI's assertion that SBC's proposal would place MCI "at a significant competitive disadvantage." MCI has access to an end user's CPNI once it obtains oral or written approval to view it, because SBC sends MCI a hard copy of the CSR. Moreover, MCI's argument ignores the fact the SBC imposes the same restrictions on its retail operations as it proposes here for MCI. SBC may not obtain CSR information on an end user of MCI or of another CLEC via OSS without having the permission of the end user to convert to SBC, verified as required by the FCC's anti-slamming rules.

OSS ISSUE 2: **TO WHAT EXTENT SHOULD MCI BE REQUIRED TO INDEMNIFY SBC ILLINOIS IN THE EVENT OF UNAUTHORIZED ACCESS FOR USE OF SBC ILLINOIS' OSS BY MCI PERSONNEL?**

ICA Reference: OSS § 2.2

The parties dispute the scope of MCI's indemnity obligation for damage to SBC's OSS. SBC proposes language that would require MCI to indemnify SBC for damage to the OSS caused by anyone gaining access to the OSS through MCI's workstations or systems. MCI's proposed language makes MCI responsible only if its use of the OSS gave rise to a claim against SBC by an MCI end user or third party.

MCI's access to SBC's OSS provides many operational benefits to MCI. Its use of the OSS also creates risks, however, such as the possibility that unauthorized use of the OSS through an MCI workstation could result in damage to the OSS or to a third party. The Commission finds that MCI – the entity with direct control over access to its workstations and systems – is in the best position to prevent such harm by securing its facilities. And MCI would have little incentive to prevent OSS misuse if it bore no financial responsibility. It stands to reason, then, that, if MCI is allowed to access the OSS without direct supervision by SBC, MCI must assume the responsibility for defending against – and paying – claims by those who suffer injury as a result of alleged unauthorized misuse of the OSS through MCI's facilities.

The Commission rejects MCI's contention that SBC's indemnification language is unnecessary and would undermine the indemnification provision in Section 16 of the GT&C. The indemnification provision in the GT&C appendix is more general and does not address the unique problems surrounding use of an OSS interface.

Similarly, the Commission rejects MCI's theory that SBC's proposal is unfair because it does not involve mutual indemnity. It makes perfect sense for the indemnity to run only one way, because OSS access runs only one way. MCI obtains access to SBC's OSS; MCI does not provide SBC access to MCI's OSS.

MCI also complains it should not bear responsibility unless there is a finding of fault on its behalf. But "fault" is irrelevant, because SBC is also not "at fault" if OSS damage occurs through facilities or systems it has no ability to control. Congress and the FCC require SBC to allow CLECs to access its OSS, and that requirement should not be applied in a way that imposes on SBC all the risk of injury that may result. The Commission finds that MCI should bear the risk here because it is MCI's election to access SBC's OSS that created the risk that injury could occur through use of MCI facilities.

In addition, MCI's proposed language is unacceptable because it makes MCI responsible only for claims of injury by third parties, and not for injuries to SBC. MCI certainly cannot justify escaping responsibility for damage caused to the OSS (and SBC) through MCI's use of the systems.

PRICING ISSUE 3: **PRIOR TO THE CONFORMANCE OF THE AGREEMENT 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?**

PRICING ISSUE 4: **PRIOR TO THE CONFORMANCE OF AGREEMENT 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?**

ICA References: Price List Lines 136-161, 335-337, 479-533, 537-551, 567-584, 597-600, 608-612, 778-869, 872-877, 880-885, 930

Issue 3 involves "disaggregated" nonrecurring charges ("NRCs") while Issue 4 involves "aggregated" NRCs. The Commission's Order in Docket 02-0864 approved aggregated NRCs (*i.e.*, loop provisioning charges reflecting the aggregated costs of connecting and disconnecting a UNE loop) and directed SBC to disaggregate, by the end of the first quarter of 2005, all of its NRCs into connection and disconnection charges where applicable. SBC was also directed to disaggregate its provisioning NRCs into charges for initial and additional connections in the same timeframe. *Order*, Docket 02-0864 at 199, 203-204 (June 9, 2004). Consistent with that Order, SBC proposes to include the disaggregated NRCs in its Price List, with footnotes to explain that the disaggregated NRCs will become effective on March 31, 2005 (Issue 3), while the aggregated NRCs will be effective only until they are superseded by the disaggregated NRCs (Issue 4). The Commission adopts SBC's proposal, because it is consistent with the Commission's order in Docket No. 02-0864.

MCI objects to any delay in implementing the disaggregated NRC rate structure and proposes to exclude the aggregated rates from the Price List entirely. The Commission, however, rejected the proposal of MCI and other CLECs for an immediate disaggregation of NRCs in its Docket 02-0864 *Order*, at pp. 199, 203-204. In addition, the Commission denied an Application for Rehearing in which MCI and other CLECs requested that the Commission reconsider its decision. The Commission will not revisit its recent Docket No. 02-0864 determination here in this two-party arbitration.

MCI argues that SBC should be able to immediately implement disaggregated NRCs using a "work around" similar to one used to implement certain new UNE-P charges. The Commission rejected the same argument when MCI made it in its unsuccessful Application for Rehearing in Docket 02-0864, and, again, the Commission will not revisit that determination here. Furthermore, the record establishes that the work around MCI proposes is not possible.

MCI also argues that "SBC has not properly implemented the Commission's order in Docket 02-0864, and as a result the aggregated and disaggregated NRCs reflected in SBC's

proposed rates are inflated and *not* in compliance with the Commission's directives." The Commission does not agree. MCI offered no basis for this contention; nor did MCI propose any aggregated or disaggregated rates as an alternative to those in the Price Schedule. In any event, the aggregated rates proposed by SBC are identical to the rates in SBC Illinois Tariff 20, which were reviewed for compliance with the Order in Docket No. 02-0864 by the Commission Staff and permitted to go into effect by the Commission following the issuance of the Order.

In supplemental testimony, MCI argued, for the first time in this proceeding, that "SBC's line connection rates for DS0 loops reflect costs that are for 'design loops' and thus are not appropriate for DS0 loops." As MCI acknowledged, however, this concern was raised by MCI and other CLECs in their Application for Rehearing in Docket 02-0864, which was denied. Accordingly, the Commission has already rejected MCI's argument. MCI also argued for the first time in its supplemental testimony that there is something wrong with the disaggregated rates developed by SBC because the sum of the disaggregated initial line connecting and disconnecting charges exceeds the aggregated rate, which reflects the costs of both connecting and disconnecting UNE loops. However, the Commission finds that MCI's analysis is erroneous because it fails to recognize that in calculating the nonrecurring costs on an aggregated basis, the disconnection costs were discounted to reflect the present value of the costs associated with disconnecting a loop at the end of an assumed four-year location life for that loop. *Order*, Docket 02-0864 at 194-95. By contrast, the disconnection costs used to develop a disaggregated disconnection charge are not discounted to reflect a present value because the rate will not apply until the future when the loop is actually disconnected. In addition, the aggregated charge reflects costs for additional lines as well as initial lines. For these reasons, the aggregated NRC rate will necessarily be less than the sum of the disaggregated initial connection and disconnection charges.

The Commission notes that Staff agrees that the Order in Docket 02-0864 did not require the immediate disaggregation of the NRCs. Staff, however, recommends that the NRCs in the ICA should be those based on a forthcoming tariff. The Commission does not adopt this recommendation. There is no reason to wait for a forthcoming tariff to determine the appropriate aggregated charges, because those charges are contained in the currently effective tariff filed in compliance with the Commission's Order in Docket 02-0864 and allowed to go into effect on June 25, 2004 after Staff review. Nor is there any reason to wait to determine what disaggregated charges should be included in the Price Schedule. The appropriate disaggregated charges have already been properly determined on the basis of the compliance cost studies presented for Staff's review following the issuance of the Order in Docket 02-0864 and, therefore, are already included in the Price Schedule proposed by SBC in this case. Thus, the disaggregated, as well as aggregated, charges included by SBC in the Price Schedule comply with the Order in Docket 02-0864. The Commission notes that Staff did not challenge SBC's disaggregated rates, and that SBC has stated that it has no plan to include different disaggregated rates in any forthcoming tariff filing. Accordingly, there is no reason not to include those rates in the Price Schedule now, with a footnote indicating that they will become effective within the first quarter of 2005.

PRICING ISSUE 5: SHOULD THERE BE A RATE FOR LINE STATION TRANSFER?

ICA References: Price List Lines 84-86

In some instances where loop conditioning is requested through the trouble ticket process, the record establishes that SBC is able to provide a loop with the desired characteristics by performing a less expensive work activity than performing the conditioning – a line and station transfer (or "LST"). MCI takes the position that SBC should not be allowed to charge for the work performed in connection with such an LST on the ground that the costs associated with LST activities performed during the process of provisioning a loop or resolving a maintenance problem are already reflected in SBC's line connection charges. The Commission disagrees.

The evidence establishes that the issue here does not involve the type of LST described by MCI. Rather, the issue concerns the rate applicable to LSTs performed in lieu of conditioning, after a loop has already been provisioned. The Commission concludes that when SBC is able to perform an LST in lieu of conditioning, it should be compensated for the actual work it performs associated with that LST in lieu of the rate that would otherwise be charged for the conditioning work avoided by the LST. The Commission approves the cost-based rate proposed by SBC, as shown at line 84 of the Price List.

PRICING ISSUE 6: SHOULD SBC BE PERMITTED TO CHARGE DIFFERENTLY FOR REMOVAL OF NON- EXCESSIVE BRIDGED TAP UNDER THE MODIFIED MAINTENANCE PROCESS?

ICA References: Price Schedule Lines 102-112

Bridged tap is used in SBC's loop plant to provide loop assignment flexibility, thereby enabling SBC to meet customer demand with fewer loop facilities. The provisioning standards for xDSL technologies generally call for the removal of "excessive" bridged tap (*i.e.*, bridged tap that exceeds 2500 feet in length). Non-excessive bridged tap is generally acceptable for xDSL service. SBC, however, does offer CLECs loop conditioning options for the removal of "all" bridged tap and non-excessive bridged tap ("RABT") for the rare instances in which non-excessive bridged taps may impact the provision of xDSL based services.

SBC proposes to include in the Price Schedule TELRIC-based rates applicable to the RABT offering. MCI opposes those rates, arguing that the only rate that SBC should be allowed to charge MCI for removing bridged tap is the rate previously approved by the Commission and shown on lines 95 and 99 of the Price Schedule. The Commission adopts SBC's proposal.

As SBC demonstrated, the rate referred to by MCI is the rate that was developed for standard xDSL conditioning options and is applicable to the removal of *excessive* bridged tap only. Since most xDSL technologies currently deployed are designed to operate on loops containing non-excessive bridged tap, the removal of non-excessive bridged tap is generally not necessary and, therefore, is not part of SBC's standard conditioning option. In fact, the removal of non-excessive bridged tap was not even contemplated when the rate approved by the Commission was developed and, therefore, that rate does not reflect the significant additional

costs associated with removing non-excessive bridged tap. Accordingly, there is no valid basis for MCI's proposal to delete prices for the RABT offering from the Price Schedule.

PRICING ISSUE 7: SHOULD THE BROADBAND PRICES BE INCLUDED IN THE PRICE LIST?

ICA References: Price List Lines 114-25

For the reasons discussed in connection with NGDLC Issue 1 and UNE Issue 31, the Commission rejects MCI's proposal to include TELRIC-based rates for access to an SBC provided packetized broadband service at lines 114 through 125 of the Price List.

PRICING ISSUE 8: WHAT ARE THE APPROPRIATE RATES FOR ACCEPTANCE AND COOPERATIVE TESTING?

ICA References: Price List Lines 127-29

Alternative 1

This issue involves MCI's proposal to require SBC to provide acceptance and cooperative testing for free, as reflected by MCI's proposal to include a rate of $0.00 for such services in the Price List. As discussed in connection with xDSL Issues 4, 5 and 7, acceptance and cooperative testing are two testing options available on request when a CLEC has requested that SBC install a new xDSL capable loop. The Commission concludes that because these options go beyond that required by law, they fall outside the scope of Sections 251(b) and (c) of the 1996 Act and, therefore, are not subject to arbitration under the 1996 Act. Accordingly, it is inappropriate to include rates, terms and conditions for the provision of acceptance and cooperative testing in this ICA.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission rejects MCI's proposed language regarding the pricing for acceptance and cooperative testing. Instead, consistent with its holding in the AT&T Arbitration (Docket 03-0239), the Commission finds that SBC's labor rate as set forth in its FCC access tariff applies to such testing activities. The record establishes that acceptance and cooperative testing are not part of the standard provisioning process for xDSL loops. Thus, contrary to MCI's assertion, the costs associated with such testing are not recovered through SBC's nonrecurring charges applicable to xDSL loops.

PRICING ISSUE 9: WHAT ARE THE APPROPRIATE RATES FOR MAINTENANCE OF SERVICE CHARGE AND/OR SERVICE CALL CHARGE?

ICA Reference: Price List line 131

PRICING ISSUE 10: WHAT ARE THE APPROPRIATE LABOR RATES?

ICA Reference: Price List line 133

The parties disagree on the appropriate labor rate for services SBC performs for MCI beyond those necessary to provide UNEs. SBC proposes that the Price List reference its FCC Tariff No. 2, while MCI proposes that the rate be a Commission-ordered TELRIC rate. Staff took no position on Issue 9 but supported SBC's position on Issue 10. The Commission adopts SBC's proposed contract language on these issues.

The services at issue here are certain functions, such as making service calls or coordinating hot cuts, that are not required by the 1996 Act but that are provided by SBC at MCI's request. The Commission finds, consistent with its holding in the *AT&T Arbitration Decision* (at p. 107), that SBC's labor rate as set forth in FCC Tariff No. 2 is applicable.

MCI contends that cost-based rates are appropriate because the costs are incurred as an integral part of furnishing telecommunications services and the pricing should be consistent with the pricing of services to which they relate. It thus proposes a rate of $10.72 per quarter hour. The Commission rejects MCI's proposal. Although MCI suggests that its proposed rate reflects Commission ordered forward-looking TELRIC cost based rates, it nowhere identifies the Commission order establishing the $10.72 rate or the services to which that rate was originally applied. Moreover, the Commission believes that MCI's statement that TELRIC rates must apply to any services that relate to the furnishing of telecommunications service (*id*. at 55) represents an unprecedented expansion of the TELRIC regime. For example, DA relates to the furnishing of telecommunications service, yet even MCI admits that SBC has no obligation to provide DA, in perpetuity, at TELRIC rates.

PRICING ISSUE 11: **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?**

ICA References: Price List Lines 164-224

PRICING ISSUE 18: **WHAT ARE THE APPROPRIATE RATES FOR CENTRAL OFFICE TO REMOTE TERMINAL DARK FIBER LOOP/SUBLOOP?**

ICA References: Price List Lines 421-22

The Commission rejects MCI's proposal to include in the Price Schedule interim TELRIC-based rates for subloops that originate in the central office. Such subloops are part of the feeder loop plant. As discussed in connection with UNE Issues 40 and 41, the *TRO* makes clear that SBC has no obligation to provide MCI with unbundled access to feeder subloops. Accordingly, the Commission concludes that the parties' ICA should not include rates, terms and conditions for the provision of feeder subloops.

Staff acknowledges that SBC is no longer obligated to provision feeder subloops as UNEs. Staff, however, argues that feeder subloops are subject to unbundling requirements under Section 271 of the 1996 Act and Section 13-801 of the PUA. Staff further argues that although SBC would be in compliance with such requirements if it provided feeder subloops at rates based on a cost based methodology other than TELRIC, SBC failed to provide the Commission with proposed rates and, therefore, MCI's proposed interim rates should be adopted.

The Commission cannot adopt Staff's position. Staff's argument that the ICA should reflect a Section 271 or 13-801 requirement to provide feeder subloops on an unbundled basis is legally unsustainable for the reasons already discussed. Furthermore, Staff's position is contrary to the Commission's recent decision in the *XO Arbitration*, which held that pricing for feeder subloops should be deleted from the XO/SBC ICA. *Order*, Docket 04-0371 at 61. Moreover, the Commission is compelled to reject Staff's argument because MCI has not asserted that SBC must provide subloops under Section 271 or Section 13-801. Rather, MCI's argument that SBC should be required to provide feeder subloops was based entirely on a misreading of the FCC's rules implementing Section 251 of the 1996 Act. At no time did MCI request that SBC negotiate rates, terms and conditions for the provision of subloops as "271 UNEs" or "Section 13-801 UNEs."

PRICING ISSUE 15: **WHAT ARE THE APPROPRIATE RATES FOR ENTRANCE FACILITY?**

ICA References: Price List Lines 348-57

MCI proposes to include in the Price List TELRIC-based prices applicable to entrance facilities, *i.e.*, facilities used to connect an ILEC network with a CLEC network. As discussed in

connection with NIM Issue 17, however, the *TRO* held that CLECs are not entitled to unbundled access to entrance facilities. Accordingly, the Commission rejects MCI's proposal.

Contrary to MCI's assertion, the fact that its proposed rate for entrance facilities was taken from SBC Tariff 20 does not support inclusion of that rate in this ICA. For the reasons discussed above, SBC has no continuing state law obligation to provide entrance facilities. Furthermore, even if the Commission were to adopt Staff's position that SBC has an obligation to provide non-251 UNEs under Illinois law at non-TELRIC cost based rates (and it does not), such a determination would not support the inclusion in the ICA of MCI's proposal to include *TELRIC*-based rates for entrance facilities. SBC Tariff 20 is currently under review in Docket 01-0614 on remand. One purpose of that proceeding is to determine the revisions to the tariff that are necessary to reflect changes in federal law resulting from the *TRO* and *USTA II*. Accordingly, the fact that the tariff has not been formally amended to reflect necessary changes resulting from the *TRO*, including the removal of prices for entrance facilities, does not justify including such prices in this ICA.

PRICING ISSUE 16: WHY IS IT APPROPRIATE FOR SBC TO REFERENCE FCC TARIFF 2 IN LISTING THE RATES APPLICABLE TO DEDICATED TRANSPORT NETWORK RECONFIGURATION SERVICE?

ICA References: Price List Lines 384-385

Network reconfiguration service ("NRS") enables a CLEC to remotely reconfigure its dedicated transport to better reflect the CLEC's traffic patterns. MCI argues that the appropriate rate for NRS should be the "Commission ordered forward-looking TELRIC cost based rates and not the rates in SBC's FCC Tariff No. 2." The Commission, however, has not ordered a TELRIC-based rate for NRS, nor does MCI identify what that rate may be. Moreover, NRS is an access service provided under SBC's access service tariff. It is not a UNE, nor has it ever been one. Accordingly, the Commission concludes it is appropriate to reference the FCC tariff detailing the terms, conditions and rates under which the service is offered. When changes in rates for services governed by an FCC tariff become effective, there should be no need for the parties to amend this ICA to reflect that change.

PRICING ISSUE 17: WHAT ARE THE APPROPRIATE RATES FOR DIGITAL CROSS-CONNECT SYSTEMS?

ICA References: Price List Lines 387-401

MCI has proposed to include in the Price List TELRIC-based rates for digital cross-connect systems ("DCS"). The Commission rejects MCI's proposal, because DCS is not a UNE.

A DCS aggregates and disaggregates high speed traffic carried between another carrier's point of presence ("POP") and an incumbent LEC's switching office, a connection that is often described as an "entrance facility" or "backhaul facility." As discussed in connection with NIM Issue 17, however, the *TRO* determined that ILECs are not required to provide CLECs with access to such facilities on an unbundled basis. *TRO* ¶ 365, 366. Furthermore, the FCC stated in its *Local Competition Order* (¶¶ 444, 445) that it "only require[s] incumbent LECs to permit

competitors to use DCS functionality in the same manner that incumbent LECs now permit [interexchange carriers ("IXCs")] to use such functionality." IXCs use the DCS functionality when obtaining the NRS service discussed above, which as noted above is offered to IXCs under the rates, terms and conditions of SBC's access tariff, and the rates for those services are not TELRIC-based. Consistent with the Local Competition Order, DCS services are also available to MCI and other CLECs under the terms of SBC's access tariff. Accordingly, the Commission rejects MCI's proposal to include alleged TELRIC-based rates for DCS in the Price List.

The Commission also notes that the price proposed by MCI for DCS is not based on cost, but is based on a presumed rate from Texas. There is no evidentiary basis for MCI's proposal to use those rates in Illinois.

PRICING ISSUE 19: WHAT ARE THE APPROPRIATE RATES FOR ROUTINE NETWORK MODIFICATIONS?

ICA Reference: Price List Line 421

The *TRO* states (at ¶ 640) that the FCC's "pricing rules provide incumbent LECs with the opportunity to recover the costs of . . . routine network modifications." SBC proposed that the price for routine network modifications be determined on an individual case basis ("ICB"), and reflect an engineering estimate of the actual costs of time and material required to perform the routine network modifications. To allay concerns that SBC's proposal might lead to the double-recovery of routine maintenance costs that are otherwise recovered through existing loop rates, SBC offered to include clarifying language in the UNE Appendix that states: "ICB rate shall not include any costs already recovered through existing applicable recurring charges."

The Commission approves SBC's proposal, and rejects MCI's. MCI proposes that, instead of recovering routine network modification costs on an ICB basis, the price for routine network modifications be set at $0.00 in all cases. MCI avers that its position is supported by the Commission's decision in the recent XO Arbitration proceeding, Docket 04-0371, but that is not the case. In fact, in the XO Arbitration Order, the Commission adopted SBC's position, holding that "SBC may impose a charge, on an ICB basis, for any routine network modification cost that is not recovered through existing UNE rates (or any rate) and for any network modification cost that is not routine." *Order*, Docket 04-0371 at 11 (Sept. 9, 2004). MCI's proposal is based on the erroneous assumption that costs of routine network modifications are fully recovered through existing recurring loop rates. In fact, as SBC's cost witness, Dr. Currie, demonstrated, the cost studies used to establish existing loop rates do not reflect all the costs of equipment installed as a part of routine network modifications. Thus, the Commission rejects MCI's proposal, and adopts SBC's.

PRICING ISSUE 20: WHAT ARE THE APPROPRIATE RATES FOR LINE INFORMATION DATABASE?

ICA References: Price List Lines 425-27

PRICING ISSUE 21: SHOULD CALLING NAME BULK DOWNLOAD ("CNAM") BE INCLUDED IN THE INTERCONNECTION AGREEMENT?

ICA References: Price List Lines 429-32

PRICING ISSUE 22: WHAT ARE THE APPROPRIATE RATES FOR 800 DATABASE?

ICA References: Price List Lines 434-40

Pricing Issues 20, 21, and 22 concern rates for line information databases ("LIDB"), calling name bulk download ("CNAM") and 800 databases. In the *TRO* (¶ 551), the FCC ruled that CLECs are not entitled to these call related databases on an unbundled basis at TELRIC rates unless such access is obtained via unbundled local switching. *TRO* ¶ 551; 47 C.F.R. § 51.319(d)(4)(i)(B). For the reasons discussed above, because the *TRO*, *USTA II*, and the *Interim Order* preclude the inclusion in this ICA of rates, terms and conditions for unbundled enterprise market and mass market switching, prices for CNAM, LIDB, and 800 calling databases also should not be included in the ICA. Accordingly, MCI's proposal to include TELRIC-based prices for these databases in the Price Schedule is rejected and Pricing Issues 20, 21, and 22 are dismissed as moot.

PRICING ISSUE 23: WHAT ARE THE APPROPRIATE RATES FOR SS7?

ICA References: Price List Lines 442-462

Our resolution of this issue is identical to our resolution of Pricing Issues 20, 21 and 22. As in the case of call related databases, the *TRO* held that ILECs are not required to provide CLECs with unbundled access to SS7 Signaling at TELRIC rates unless such signaling is requested in conjunction with unbundled local switching. *TRO* ¶ 544.

PRICING ISSUE 25: WHAT ARE THE APPROPRIATE RATES FOR COORDINATED HOT CUTS?

ICA References: Price List lines 473-76

The parties disagree on the appropriate rate for the additional effort involved in providing a coordinated hot cut ("CHC"). SBC proposed no language for this specific service in the Price List, although it references a rate elsewhere in the Agreement. MCI proposes that the rate be a Commission-ordered TELRIC rate. Staff supports SBC's proposal, and we adopt that proposal.

As an initial matter, it is important to clarify what is not involved here: the cost of providing the unbundled loop when service for a customer is cut over to MCI. That charge,

which is TELRIC-based, is the only provisioning charge for non-CHC requests. That loop charge does not include SBC's additional labor cost to provide the additional coordination MCI can request for a hot cut. The charge for such optional coordination is at issue here, and SBC proposes that the rates be those set forth in Section 13.2.6 of its FCC Tariff No. 2. This Commission determined last year, in the SBC/AT&T arbitration, that CHCs require SBC to perform additional work and that SBC should be compensated for that work at the rates set forth in SBC's FCC Tariff No. 2. Staff recommends that the Commission follow that decision and adopt SBC's proposal here.

MCI contends the appropriate CHC rate should be what MCI calls Commission-ordered forward-looking TELRIC cost based rates, and proposes "the comparable rates" it submitted in Docket No. 03-0593. MCI's position fails on several levels. First, the Commission never adopted the rates MCI proposed, or any other rates, in Docket No. 03-0593, as Staff noted in its testimony.

Second, the rate that MCI proposes relates to a different process for hot cuts than the one at issue here. The rates MCI submitted in Docket No. 03-0593 related to a new batch cut process that was being developed in that docket, while MCI's hot cut options under this Agreement are the standard CHC option and the standard frame due time ("FDT") option.

Finally, MCI fails to explain how the rate it proposes here relates to the rate it proposes for Pricing Issue 10 ("What are the appropriate labor rates?"). The additional work associated with a CHC is one of the functions provided by SBC at MCI's request at issue there, and MCI nowhere explains how the labor rate it proposes for Pricing Issue 10 can be appropriate for the labor involved in coordinating a hot cut, while at the same time he proposes a different rate for what he contends is the same activity in connection with Pricing Issue 25.

Staff recommends that the Commission follow the *AT&T Arbitration Decision* and direct the parties to apply the labor rates set forth in SBC's FCC Tariff No. 2, and we adopt Staff's recommendation.

PRICING ISSUE 26: WHAT ARE THE APPROPRIATE RATES FOR ISDN PRIME, DIGITAL TRUNKING, ULS TRUNKING, ISDN PRIME TRUNK PORT, PER PORT-AT/REARRANGED CHARGES, ULS TRUNK PORT, SUBSEQUENT ULS TRUNK PORT, ISDN PRI PORT, ISDN-PRIME TRUNK PORT-CUSTOM, DIGITAL TRUNKING TRUNK PORT, DS1 TRUNK PORT, AND ISDN PRI PORT FEATURES?

ICA References: Price List Lines 552-55, 560, 564, 658-61, 632, 633-65, 636-37, 922-28

This issue concerns MCI's proposal to include in the Price Schedule rates for DS1 capacity related switch ports, which, by definition, are related to the provision of unbundled local switching to enterprise market customers. In its Initial Brief, MCI said it has withdrawn its proposal, consistent with its agreement that SBC need not provide MCI with local switching for

the purpose of serving end user customers using DS1 capacity and above loops (*i.e.*, enterprise market), absent an FCC waiver. Accordingly, Pricing Issue 26 has been resolved.

PRICING ISSUE 27: SHOULD THE PRICING SCHEDULE INCLUDE A LISTING OF APPLICABLE RATE ELEMENTS AND ASSOCIATED RATES FOR UNE-P?

PRICING ISSUE 28: SHOULD THE PRICING SCHEDULE INCLUDE A LISTING OF APPLICABLE RATE ELEMENTS AND ASSOCIATED RATES FOR SPECIAL EEL CONFIGURATIONS?

ICA References: Price List Lines 668-774

The Commission rejects MCI's proposed section in the Price Schedule (lines 668 through 774) that would identify the rate elements and associated rates for specific new UNE-P and EEL (including special access to UNE conversions) combinations. Each of the proposed UNE-P combinations include as a component either enterprise or mass market unbundled local switching. The EEL combinations all include dedicated transport. Enterprise switching, however, was declassified as a UNE in the *TRO*. Accordingly, SBC has no obligation to provide new UNE-P combinations that include enterprise switching (see discussion of UNE Issue 54). Mass market switching and dedicated transport are subject to the FCC's *Interim Order*. For the reasons discussed above, the ICA at issue in this case should not include any terms and conditions providing for unbundled access to the network elements described in the *Interim Order*. Accordingly, the ICA also should not include rates terms and conditions for new UNE combinations that include those elements. As a result, the Commission dismisses issues 27 and 28 as moot.

The Commission also notes that MCI's proposed schedule does not accurately reflect the currently effective Commission-approved nonrecurring charges for UNE-P and EEL combinations. For example, MCI's presentation of the nonrecurring charge for UNE-P combinations omits line connection and service order charges as well as other ancillary charges, all of which are applicable to new UNE-P combinations pursuant to the Order in Docket 02-0864. For EELS, MCI used the NRC rate elements and price levels that were included in SBC's EELs tariff *before* that tariff was amended to incorporate the revised NRC rate structure and prices approved in Docket 02-0864. For example, MCI shows a line connection NRC for a two-wire digital unbundled loop combined with a DS1 or DS3 unbundled dedicated transport at $20.21, despite the fact that the order in Docket 02-0864 authorizes a rate of $72.50.

PRICING ISSUE 29: **WHAT ARE THE APPROPRIATE RATES FOR DS1 INTEROFFICE UNBUNDLED DEDICATED TRANSPORT – NONCOLLOCATED, 4-WIRE DS1 DIGITAL LOOP TO DS1 INTEROFFICE DEDICATED TRANSPORT NONCOLLOCATED, AND DS3 INTEROFFICE UNBUNDLED DEDICATED TRANSPORT NONCOLLOCATED?**

ICA References: Price List Lines 870-71, 878-79, 886-87

Alternative 1

This issue relates to MCI's proposal to include in the Price Schedule nonrecurring charges applicable to DS1 and DS3 interoffice dedicated transport facilities when included as part of a noncollocated EEL. As explained above, the Commission finds that the ICA should not contain any rates, terms and conditions for the provision of dedicated transport and EELs, and Pricing Issue 29 is accordingly dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission rejects MCI's proposal to include rates applicable to "noncollocated" EELs in the Price Schedule for two reasons. First, *USTA II* vacated the rules requiring SBC to offer dedicated transport as a UNE. Accordingly, SBC has no obligation to provide combinations of unbundled loops and unbundled dedicated transport. Second, the *TRO* established minimum eligibility criteria that must be satisfied by a requesting carrier, such as MCI, before ordering high capacity EELs. One of the criteria is that "each circuit must terminate into a collocation governed by Section 251(c)(6) at an incumbent LEC central office within the same LATA as the customer premises." *TRO* ¶ 597. The minimum eligibility criteria for EELs, including the collocation requirement, were affirmed in *USTA II*. 359 F.3d at 592-93. Consistent with the *TRO*, MCI agreed to language in Section 22.1.1 of the UNE Appendix that provides that "[a]n EEL is required to terminate in a collocation arrangement." Accordingly, it is improper to include rate elements specific to noncollocated EELs in the ICA.

PRICING ISSUE 30: **SHOULD SBC ILLINOIS BE REQUIRED TO PRICE OPERATOR SERVICES AND DIRECTORY ASSISTANCE RATE ELEMENTS AT TELRIC BASED RATES?**

ICA References: Price List lines 940-41, 943-46, 948-49, 981-82, 993-94

Alternative 1

SBC proposed market-based rates for Local Directory Assistance ("DA"), National DA, and Reverse DA, while MCI proposed rates that it claims are TELRIC-based. SBC also proposes market-based rates for Operator Services ("OS"). MCI submitted no testimony on OS rates, although it included OS rates in the Price List. The Commission rejects both proposals, and orders that all prices for OS/DA be excluded from the agreement.

SBC's obligation to provide OS/DA to MCI is a corollary to its obligation to provide unbundled local switching. As the Commission explained above, federal law precludes the inclusion of any terms and conditions for unbundled switching, or any corollary service, in this Agreement. The Commission notes that Staff agrees that the FCC's *Interim Order* "has effectively eliminated" this issue. Staff Position Statements at p.3. Accordingly, the Commission holds that all the Price List line items for OS/DA, including agreed prices, should be deleted in their entirety, and Price Issue 30 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

SBC proposed market-based rates for Local Directory Assistance ("DA"), National DA, and Reverse DA, while MCI proposed rates that it claims are TELRIC-based. SBC also proposes market-based rates for Operator Services ("OS"). MCI submitted no testimony on OS rates, although it included OS rates in the Price List. The Commission adopts SBC's proposal, and rejects MCI's, because TELRIC rates are inapplicable here.

Under long-standing FCC precedent, an ILEC is required to offer OS/DA at TELRIC rates pursuant to Section 251(b)(3) only as long as the CLEC is not able to route its OS/DA traffic off of the SBC network. *UNE Remand Order* ¶¶ 447-464; *TRO* ¶ 560. This Commission has similarly recognized that SBC is obligated to offer OS/DA at TELRIC rates only "until such time as [SBC] successfully demonstrates, after testing and our approval of terms, that CLECs have the ability to route their OS and DA traffic to their own OS and DA platforms or to those of a third party provider." *TELRIC Compliance Order*, Docket No. 98-0396, p. 95 (Oct. 16, 2001). As a result, if SBC offers customized routing, it can charge market-based rates for OS and DA.

The Commission finds that SBC has demonstrated on UNE Issues 55 and 56 that it offers customized routing. Accordingly, the TELRIC pricing regime is irrelevant for OS and the three DA services at issue here.

Alternative 3 (If Neither Alternative 1 Nor 2 Adopted)

SBC proposed market-based rates for Local Directory Assistance ("DA"), National DA, and Reverse DA, while MCI proposed rates that it claims are TELRIC-based. SBC also proposes market-based rates for Operator Services ("OS"). MCI submitted no testimony on OS rates, although it included OS rates in the Price List. The Commission adopts SBC's proposal, and rejects MCI's, for the following reasons:

Local DA: MCI suggests that the Commission use a rate approved by the Michigan PSC because this Commission has not established a TELRIC rate for Local DA. The Commission rejects MCI's proposal. First, MCI is inappropriately shopping for lower rates, since it does not even recommend rates from the same state for all OS/DA pricing issues. It instead proposes Michigan rates for this OS/DA issue and rates from Texas for another OS/DA issue (Pricing Issue 32). Such rate shopping is inappropriate. Second, MCI offers no cost basis for the TELRIC rate it seeks to import from Michigan to show that the Michigan rate is appropriate for Illinois.

National DA: MCI proposes the same rate for National DA as for Local DA. But the record establishes that SBC pays an outside vendor to maintain and update its National DA

database, and that vendor charges an unregulated, market-based rate. SBC cannot negotiate such a low rate as MCI proposes, and it would lose money at MCI's rate. Second, MCI submitted no cost study in support of its proposed rate, and did not explain either why the National DA rate should be the same as the Local DA rate or why the Michigan rate for Local DA should be the Illinois rate for National DA.

Reverse DA: MCI proposes the same rate for Reverse DA as for Local DA. However, Reverse DA is not a telecommunications service, it falls outside the ambit of SBC's provisioning DA obligations under the 1996 Act, and no cost-based rate or resale discount is applicable. In addition, MCI submitted no cost study in support of its proposed rate, and did not explain either why the Reverse DA rate should be the same as the Local DA rate or why the Michigan rate for Local DA should be the Illinois rate for Reverse DA.

OS: Although MCI included a proposed rate for manual OS in the Price Schedule, it did not discuss an OS price issue and it offered no testimony in support of its apparent contention that the OS rate should be TELRIC-based. MCI also offered no cost study evidence in support of its preferred number. The absence of record support for MCI's proposed rate requires that the Commission reject MCI's position here.

PRICING ISSUE 31: SHOULD SBC ILLINOIS BE REQUIRED TO PRICE OPERATOR SERVICES AND DIRECTORY ASSISTANCE BRANDING RATE ELEMENTS AT TELRIC BASED RATES?

ICA References: Price List lines 952, 983

Alternative 1

SBC proposes non-recurring rates for OS and DA branding initial/subsequent load that are market-based, while MCI proposes a TELRIC-based rate. The Commission rejects both proposals, and orders that all prices for this OS/DA service be excluded from the agreement. SBC's obligation to provide OS/DA to MCI is a corollary to its obligation to provide unbundled local switching. As the Commission determined above, federal law precludes the inclusion of any terms and conditions for unbundled switching, or any corollary service, in this Agreement. The Commission notes that Staff agrees that the FCC's *Interim Order* "has effectively eliminated" this issue.

Alternative 2 (If Alternative 1 Not Adopted)

SBC proposes non-recurring rates for OS and DA branding initial/subsequent load that are market-based, while MCI proposes a TELRIC-based rate. The Commission rejects MCI's proposal, and adopts SBC's. As the Commission noted above, pursuant to federal law SBC is obligated to provide OS/DA at TELRIC rates only where the CLEC is not able to route its OS/DA traffic off of the SBC network. Because SBC provides custom routing, and because the market for OS/DA is competitive, SBC can charge market-based rates for OS/DA services. The only support MCI offers for its position is that the TELRIC-based rate established by the Commission in Docket Nos. 96-0486/0569 is still appropriate. MCI's premise is mistaken, however, because SBC can no longer be required to offer OS and DA at TELRIC rates.

PRICING ISSUE 32: **SHOULD SBC ILLINOIS BE REQUIRED TO PRICE OPERATOR SERVICES AND DIRECTORY ASSISTANCE BRANDING PER CALL RATE ELEMENTS AT TELRIC RATES?**

ICA References: Price List lines 953-54, 984-85

Alternative 1

SBC proposes non-recurring rates for OS and DA branding per call that are market-based, while MCI proposes a TELRIC-based rate. The Commission rejects both proposals, and orders that all prices for this OS/DA service be excluded from the agreement. SBC's obligation to provide OS/DA to MCI is a corollary to its obligation to provide unbundled local switching. As the Commission determined above, federal law precludes the inclusion of any terms and conditions for unbundled switching, or any corollary service, in this Agreement. The Commission notes that Staff agrees that the FCC's *Interim Order* "has effectively eliminated" this issue.

Alternative 2 (If Alternative 1 Not Adopted)

SBC proposes non-recurring rates for OS and DA branding per call that are market-based, while MCI proposes a TELRIC-based rate. The Commission rejects MCI's proposal, and adopts SBC's, because SBC is obligated to provide OS/DA at TELRIC rates only where the CLEC is not able to route its OS/DA traffic off of the SBC network. As the Commission explained above, because SBC provides custom routing, and because the market for OS/DA is competitive, SBC can charge market-based rates for OS/DA services.

Alternative 3 (If Neither Alternative 1 Nor 2 Adopted)

SBC proposes non-recurring rates for OS and DA branding per call that are market-based, while MCI proposes a TELRIC-based rate. MCI argues that the Commission should use a TELRIC rate approved by the Texas PUC because this Commission has not established a TELRIC rate for OS/DA branding per call. But again, MCI is simply shopping for lower rates, because it does not recommend rates from the same state for all OS/DA pricing issues. It instead proposes Texas rates for this OS/DA issue and rates from Michigan for another OS/DA issue (Pricing Issue 30). Such rate shopping is inappropriate. Moreover, MCI offers no cost basis for the TELRIC rate it seeks to import from Texas to show that the Texas rate is appropriate for Illinois, and has failed to show why the rate it has cherry-picked from Texas bears any relation to SBC's costs in Illinois.

PRICING ISSUE 33: **SHOULD RATES FOR ANCILLARY MESSAGE BILLING COMPENSATION BE INCLUDED IN THE INTERCONNECTION AGREEMENT?**

ICA Reference: Price List Line 996

SBC has agreed that the rate for Ancillary Message Billing on line 996 of the Price Schedule can be removed, thereby resolving this issue.

PRICING ISSUE 34: WHAT ARE THE APPROPRIATE NON-RECURRING RATES FOR NON-PUBLISHED EMERGENCY NUMBER SERVICE?

ICA References: Price List lines 998-999

SBC proposes a market-based rate for non-published emergency number service, under which it relays a message to a non-published subscriber if a caller is trying to reach that subscriber in an emergency situation. MCI proposes a zero rate for this service. The Commission adopts SBC's position.

SBC provides the non-published emergency number service because it is a standard industry practice and promotes public safety, as MCI admits. The record demonstrates that this service is labor-intensive, because it requires the involvement of an SBC operator supervisor, who must call a special number to obtain the non-published number and then call the subscriber to let him know that the caller is attempting to make reach him and to provide the subscriber with the caller's contact number.

The Commission rejects MCI's argument that a TELRIC rate should apply to this service. MCI does not contend that the service is a UNE. Instead, MCI asserts that because it cannot provide the service itself, SBC should not be "unjustly enriched" and should only be allowed to charge a cost-based rate. That argument, however, is at odds with MCI's actual proposal in this arbitration: MCI does not propose any cost-based rate, but instead simply includes a rate of $0.00 in the Price List. The Commission concludes that it would be unfair to require SBC to provide this special service yet receive no compensation, as MCI proposes. SBC charges the same rate for this service throughout the Midwest, and the rate is reasonable, given the labor involved in providing the service. Thus, the Commission adopts SBC's proposed rate.

PRICING ISSUE 36: WHAT ARE THE APPROPRIATE RATES FOR TRANSIT SERVICE?

ICA References: Price List Lines 1044-47

Alternative 1

This issue concerns MCI's proposal to include a so-called "TELRIC cost based rate" for transit service in the Price Schedule. Transiting refers to the transport of traffic to a non-SBC office. As discussed in connection with RC Issue 25, however, the Commission has consistently recognized that transiting is not required under the 1996 Act. Accordingly, rates, terms and conditions for transiting service are not arbitrable under Sections 252(a) and (b) of the 1996 Act. The Commission thus rejects MCI's proposal to include a rate for transit service in the Price List for the parties' ICA.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts the rate found in SBC's current Tariff 20, Part 23, Section 2, Sheet 3.1. MCI proposed a rate for Transiting Tandem Switching of $0.001072 per minute of use, which is significantly lower than the rate for tandem switching included in the tariff

($0.004836 per minute of use). MCI did not offer any cost support for its proposed rate and, therefore, it is rejected.

PRICING ISSUE 39: WHAT ARE THE APPROPRIATE RECURRING RATE ELEMENTS (*I.E.*, CLASSIFICATION AND/OR RATE STRUCTURE) FOR DIRECTORY ASSISTANCE LISTINGS?

ICA References: Price List lines 961-977

Alternative 1

Subsequent to the filing of the parties' Petition and Response, MCI submitted testimony attempting to describe a "Pricing Issue 39," concerning per-listing rates for bulk downloads of SBC's Local Directory Assistance Listing Information ("DALI"). The Commission will not address this issue, because it was not included either in the DPL MCI filed with its Petition or in the DPL SBC filed with its Response. Section 252(b)(4)(A) of the 1996 Act provides that the Commission must "limit its consideration of any petition . . . to the issues set forth in the petition and in the response."

Alternative 2 (If Alternative 1 Not Adopted)

SBC proposes market-based per-listing rates for bulk downloads of its Local Directory Assistance Listing Information ("DALI"), while MCI proposes cost-based rates. The Commission adopts SBC's position on this issue.

As MCI and SBC agree, DALI is not a UNE, and thus the FCC's TELRIC pricing rules do not apply. MCI nonetheless contends that cost-based rates are necessary to avoid discriminatory access. The Commission rejects that contention. As MCI admits, Section 251(b)(3) of the 1996 Act requires at most only that SBC provide DALI to CLECs at the same rate it provides the data to itself. SBC demonstrated that it provides DALI to CLECs, including MCI, at the same rate it imputes to itself. MCI has not provided any evidence that SBC's rate for DALI does not satisfy the standard of Section 251(b)(3). Rather, MCI would have this Commission accept the proposition that any rate higher than that MCI would like to pay must be "discriminatory." The Commission will not accept that proposition.

Moreover, the rates that MCI proposes are based on SBC's rates in Texas. MCI offers nothing to suggest that the cost basis for the rates it seeks to import from Texas is applicable in Illinois; it is simply shopping around for a lower rate. Indeed, in its direct testimony, MCI quotes extensively from a California PUC order on DALI rates – but MCI does not propose those California rates here, presumably because one of them is more than four times higher than the comparable Texas rate.

RC ISSUE 1A:	**WHAT ARE THE APPROPRIATE CLASSIFICATIONS OF TRAFFIC THAT SHOULD BE ADDRESSED IN THE RECIPROCAL COMPENSATION APPENDIX?**
RC ISSUE 1B:	**WHAT IS THE PROPER DEFINITION AND SCOPE OF § 251(b)(5) TRAFFIC AND ISP-BOUND TRAFFIC IN ACCORDANCE WITH THE FCC'S ISP TERMINATING COMPENSATION PLAN?**
RC ISSUE 1C:	**IS SECTION 251(b)(5) RECIPROCAL COMPENSATION LIMITED TO TRAFFIC THAT ORIGINATES AND TERMINATES WITHIN THE SAME ILEC LOCAL CALLING AREA?**
RC ISSUE 1D:	**IS IT APPROPRIATE TO DEFINE LOCAL TRAFFIC AND ISP-BOUND TRAFFIC IN ACCORDANCE WITH THE *ISP COMPENSATION ORDER*?**
RC ISSUE 1E:	**SHOULD NON-251/252 SERVICES SUCH AS TRANSIT SERVICES BE NEGOTIATED SEPARATELY?**
	ICA References: Reciprocal Compensation §§ 2.1, 2.3, 4.2.4, 4.2.4.1, 4.2.5.1, 4.9.1, 13.0, 13.1

Section 251(b)(5) of the 1996 Act imposes a duty to establish reciprocal compensation arrangements for the transport and termination of certain traffic. 47 U.S.C. § 251(b)(5). Interpreting the Act, the FCC has ruled that services provided in conjunction with certain non-local communications (namely, the "exchange access, information access, and exchange services for such access" provided to "interexchange carriers and information service providers" as described in Section 251(g) of the Act) are excluded from reciprocal compensation altogether. Reciprocal Compensation Issue 1 concerns contract language implementing the reciprocal compensation obligations created by the 1996 Act and the FCC's implementing rules, and in particular the classification of different types of traffic for reciprocal compensation purposes. As explained below, SBC's proposed language is consistent with governing law, while MCI's is not. Thus, as Staff recommends, the Commission rejects MCI's position and adopts SBC's position on Reciprocal Compensation Issue 1, as follows:

Issue 1(a). As discussed below, the Appendix Reciprocal Compensation should classify traffic, for reciprocal compensation purposes, as Toll Traffic (intraLATA or interLATA), Section 251(b)(5) Traffic, or ISP-Bound Traffic.

Issue 1(b). In accordance with the FCC's *ISP Remand Order*, Section 251(b)(5) Traffic is all non-ISP-Bound Traffic that originates and terminates between end users in the same local calling area, while ISP-Bound Traffic is traffic that terminates to an ISP end user customer located in the same local calling area as the originating end user.

Issue 1(c). The Section 251(b)(5) reciprocal compensation obligation is limited to traffic that originates and terminates within the same ILEC local calling area, as discussed below.

Issue 1(d). In accordance with the *ISP Remand Order*, "ISP-Bound Traffic" should be defined separately from local traffic that is subject to the Section 251(b)(5) reciprocal compensation obligation, as explained below.

Issue 1(e). Non-Section 251/252 services such as Transit Services should be negotiated separately, and are not subject to arbitration, as explained in SBC's discussion of Reciprocal Compensation Issue 25.

MCI proposes to classify traffic exchanged between the parties as toll traffic (interLATA or intraLATA), transit traffic, or as "Local Calls," and proposes that the term "Local Calls" define all calls subject to reciprocal compensation under Section 251(b)(5) of the 1996 Act. MCI's proposal is outdated, and as Staff correctly concludes is inconsistent with current FCC rules.

In its *Local Competition Order*, the FCC "attempted to describe the universe of traffic that falls within subsection (b)(5) as all 'local' traffic," just as MCI proposes here. In its subsequent *ISP Remand Order* (¶ 24), however, the FCC held that it would "refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5)." Thus, the FCC held, "we now find inappropriate" use of the "local" "terminology." *Id.* n.61. The FCC concluded that it was "mistaken" to have used such terminology, which "created unnecessary ambiguity . . . because the statute does not define the term 'local call," and held that "we correct that mistake here." *Id.* ¶¶ 45, 46. Accordingly, the FCC amended its reciprocal compensation rules "by striking 'local' before 'telecommunications traffic' each place such word appears." *Id.* App. B – Final Rules. We reject MCI's attempt to resurrect the terminology already decisively rejected by the FCC.

SBC, like MCI, proposes to include intraLATA and interLATA Toll Traffic classifications, but instead of classifying traffic as "Local Calls" proposes to separately classify "Section 251(b)(5) Traffic" and "ISP-Bound Traffic." SBC § 2.1. SBC's proposal is in conformity with the FCC's *ISP Remand Order*, and will be adopted.

In the *ISP Remand Order*, the FCC, having discarded the terminology "local," instead recognized two distinct categories of traffic that were previously included in the scope of "local traffic": traffic that is subject to reciprocal compensation under Section 251(b)(5) (which includes traditional local voice service), and traffic that is carved-out of Section 251(b)(5) by Section 251(g), which includes ISP-bound traffic. *ISP Remand Order* ¶ 23. Thus, SBC's proposed language appropriately defines "Section 251(b)(5) Traffic" to identify the traffic that is subject to the reciprocal compensation obligation of Section 251(b)(5), and "ISP-Bound Traffic" to identify the ISP-bound traffic that the FCC held is *not* subject to Section 251(b)(5), but is instead subject to the *ISP Remand Order* compensation plan (which consists of a series of declining rate caps that ILECs may elect). Indeed, the very point of the *ISP Remand Order* was to distinguish between these two categories of traffic. In short, as Staff concludes, SBC's traffic classification is in accordance with the FCC ISP Remand Order.

Moreover, there are practical reasons why ISP-bound traffic must be defined separately from section 251(b)(5) traffic. Because different compensation rules apply to each, it would be

impractical to lump these different kinds of traffic together under the label "local." Section 251(b)(5) traffic is governed by the reciprocal compensation requirements of Section 251(b)(5), while "intercarrier compensation for ISP-bound traffic is within the jurisdiction of [the FCC] under section 201 of the Act." Thus, the compensation rates and terms for each kind of traffic are different. For instance, the FCC imposed an overall cap on ISP-bound minutes for which compensation is due. That cap does not apply to non-ISP-bound, Section 251(b)(5) traffic. And while the FCC held that the rate caps for ISP-bound traffic apply only if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate" (*id.* ¶ 89), a CLEC is not required to accept that offer, but may accept different rates for each kind of traffic.

MCI suggests that classifying ISP-bound traffic as local traffic subject to reciprocal compensation under section 251(b)(5) is appropriate because the D.C. Circuit overturned the FCC's interpretation of section 251(g) in the *ISP Remand Order*. But, as MCI itself notes, the FCC's rules implementing different charges applied to ISP-bound traffic and other local traffic were not vacated. Those FCC rules are still in effect, and thus must, as a matter of law, be reflected in the parties' contract.

The FCC's Wireline Competition Bureau reached the same result in the *Verizon Virginia Arbitration*. In that arbitration, the Bureau (acting in the place of the Virginia commission) rejected MCI's proposal and ordered that the term 'section 251(b)(5) traffic' be substituted for the term 'Local Traffic.'"

MCI's description of what constitutes "local" traffic that falls under Section 251(b)(5), as opposed to interexchange or toll traffic, which is not subject to Section 251(b)(5), is also inconsistent with federal law. *See infra* Reciprocal Compensation Issue 4.

Finally, SBC has proposed contract language in Section 2.3 stating that "ISP-Bound Traffic" that is governed by the *ISP Remand Order* is limited to ISP-bound traffic that is local in nature – *i.e.*, where the calling party and the called ISP are in the same local calling area. That is because this is the only type of ISP-bound traffic addressed by the FCC in the *ISP Remand Order*. As Staff correctly concludes, the term "ISP-bound traffic" in the *ISP Remand Order* refers to calls from end users to ISP providers physically located in the same local calling area, and not "ISP traffic between end users and ISP providers located in different local calling areas.

RC ISSUE 4A: **WHAT IS THE APPROPRIATE FORM OF INTERCARRIER COMPENSATION FOR FX AND FX-LIKE TRAFFIC INCLUDING ISP FX TRAFFIC?**

RC ISSUE 4B: **IF FX AND FX-LIKE TRAFFIC MUST BE SEGREGATED AND SEPARATELY TRACKED FOR COMPENSATION PURPOSES, HOW SHOULD THAT BE DONE?**

ICA Reference: Reciprocal Compensation § 2.7 *et seq*.

Issue 4A: Form of Compensation: As this Commission has repeatedly held,[1] the appropriate form of intercarrier compensation for FX and FX-like traffic, including ISP-bound FX traffic, is bill and keep. Most recently, the Commission reaffirmed that decision in SBC's arbitration with AT&T in Docket No. 03-0239. MCI asserts that SBC's position in this proceeding goes beyond the Commission's decision in the AT&T arbitration, because, according to MCI, the Commission held in "the ISP-bound traffic portion of the Commission decision" that "ISP-bound traffic is not subject to the bill and keep regime established for non-ISP vFX [voice FX traffic]." This misrepresents what the Commission held in the AT&T arbitration. In truth, the ISP-bound traffic portion of the Commission's decision in the AT&T arbitration clearly and unequivocally held that ISP-bound FX traffic *is* subject to bill-and-keep, just like voice FX traffic.

As Staff recommends, the Commission should resolve Intercarrier Compensation Issue 4A as it has consistently resolved the same issue in the past, by ruling that all FX and FX-like traffic, including ISP-bound FX and FX-like traffic, will be subject to bill and keep.

Issue 4B: Tracking Method: Since FX traffic (ISP-bound and otherwise) must be segregated from other traffic in order not to be included in the parties' reciprocal compensation bills to each other, the question arises how that segregation will be accomplished. Only SBC has proposed a method for accomplishing this segregation. Indeed, MCI not only proposed no method for tracking the traffic that will have to be tracked as a result of the Commission's resolution of Issue 4A, but also offered no cognizable criticism of SBC's proposed method. (We say "cognizable criticism," because MCI does criticize SBC's method, but MCI's criticisms incorrectly assume that bill-and-keep will apply only to (and therefore tracking will be necessary only for) voice FX traffic, and not ISP-bound FX traffic. As we held in the AT&T arbitration, however, bill-and-keep applies to all FX traffic, including ISP-bound FX traffic.)

Staff recommends that the Commission adopt the tracking method that it approved in the AT&T arbitration. We conclude it is more appropriate, however, for MCI to bear the

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[1] *See*, in addition to the AT&T arbitration decision cited in the text, *In re Level 3 Communications, Inc.*, Arbitration Decision, Docket No. 00-0332, 2000 WL 33424133 at *7 (ICC August 30, 2000); *In re TDS Metrocom, Inc.*, Arbitration Decision, Docket No. 01-0338, 2001 WL 1316574, at *39 (ICC August 8, 2001); *Re Global NAPs, Inc.*, Arbitration Decision, Docket No. 01-0786, 2002 WL 31341347, at *12 (ICC May 14, 2002); *Essex Telecom, Inc. v. Gallatin River Communications, LLC*, Order, Docket No. 01-0427, 2002 WL 31951289, at *5-7 (ICC July 24, 2002); *In re Global NAPs Illinois, Inc.*, Order on Rehearing, Docket No. 02-0253, 2002 WL 31744735, at *11-14 (ICC Nov. 7, 2002).

consequences of its chosen litigation strategy. Having opted to contest the Commission-established bill-and-keep regime for FX traffic in the face of no less than six adverse Commission decisions, and having elected, in the service of that approach, to propose no method for tracking traffic that MCI knew would have to be tracked unless the Commission overturned its prior rulings, MCI should be required to accept – indeed, has in effect accepted – the tracking method SBC proposed. Moreover, MCI, presumably in the pursuit of its objective of undoing the Commission's precedents on FX traffic, actively opposed the method of tracking FX traffic that the Commission approved in the AT&T arbitration. Furthermore, the tracking method that SBC proposes here, which involves the ten-digit tracking of FX numbers, is reasonable and appropriate. Accordingly, the Commission approves SBC's proposed language for Intercarrier Compensation Section 15.

RC ISSUE 5A: **WHAT IS THE APPROPRIATE TREATMENT AND COMPENSATION OF ISP TRAFFIC EXCHANGED BY THE PARTIES OUTSIDE OF THE LOCAL CALLING SCOPE?**

RC ISSUE 5B: **WHAT IS THE APPROPRIATE ROUTING AND TREATMENT OF ISP CALLS ON AN INTEREXCHANGE BASIS, EITHER INTRALATA OR INTERLATA?**

RC ISSUE 5C: **WHAT TYPES OF TRAFFIC SHOULD BE EXCLUDED FROM THE DEFINITION AND SCOPE OF SECTION 251(B)(5) TRAFFIC?**

ICA References: Reciprocal Compensation §§ 2.12, 2.12.1, 2.12.2

Issue 5(a). As explained above under Reciprocal Compensation Issue 1, the *ISP Remand Order* addressed only ISP-bound traffic *within* the local calling scope – *i.e.*, a call from an end-user to an ISP in the same local calling area. The question the FCC resolved was "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area." *ISP Remand Order* ¶ 13. The FCC ruled that such ISP-bound traffic is subject to the compensation rules promulgated in the *ISP Remand Order*, and SBC has proposed contract language (the subject of Issue 1) implementing those rules.

The ICA musts also address the treatment of ISP traffic not covered by the *ISP Remand Order* – that is, traffic bound to an ISP outside the local calling area (*e.g.*, as would occur if an end-user called long distance to its ISP). SBC has proposed such language (§ 2.12 and subsections), while MCI has not. SBC's proposed language is consistent with federal law, and will be adopted.

The reason the *ISP Remand Order* did not address calls to an ISP that originate and terminate in different local calling areas, is that there was never any question that such traffic must be treated the same as any other traffic that originates and terminates in different local calling areas. In particular, such traffic constitutes intraLATA or interLATA interexchange

traffic, and remains subject to access tariffs. As Staff states, the *ISP Remand Order*'s ISP-bound traffic compensation plan "does not apply to ISP traffic that originates and terminates in different local calling areas," and the ICA should thus "clarify that the FCC's interim intercarrier compensation plan is applicable only to *ISP-bound traffic*, which includes only calls from end users to ISP providers physically located in the same local calling area."

Issue 5(b). Similarly, an interexchange call must be routed according to the terminating party's intrastate and interstate exchange access tariffs, whether or not that interexchange call is made to an ISP. While ISP-Bound Traffic within a local calling area is routed using the same Section 251(b)(5) interconnection trunks used for local traffic, no FCC rule or order exempts interexchange calls from routing on interexchange trunks, rather than local interconnection trunks, merely because the call happens to be placed to an ISP. Moreover, the appropriate routing of interexchange calls is necessary to ensure that the party terminating the traffic receives the appropriate switched access traffic.

Issue 5(c). As explained above, interexchange traffic is not Section 251(b)(5) traffic, and is not subject to reciprocal compensation. Instead, interexchange traffic is subject to intrastate and interstate access tariffs. Section 251(b)(5) does not mandate reciprocal compensation for 'exchange access, information access, and exchange services for such access. *ISP Remand Order* ¶ 34. And this exclusion applies to "all traffic" "that travel[s] to points – both interstate and intrastate – beyond the local exchange," and preserves both the interstate and intrastate "access regimes applicable to this traffic." *Id.* ¶ 37. Thus, the ICA must specify, as SBC's contract language does, that interexchange traffic – including ISP calls that originate and terminate in different local calling areas – remain subject to the access regimes and routing arrangements that apply to interexchange traffic.

For these reasons, we approve SBC's proposals for the language at issue in RC Issue 5.

RC ISSUE 6: **SHOULD EACH PARTY BE RESPONSIBLE FOR THE ACCURACY AND QUALITY OF THE DATA SUBMITTED FOR TRAFFIC THAT ORIGINATES ON EACH PARTIES' RESPECTIVE NETWORK?**

ICA References: Reciprocal Compensation §§ 3.1, 3.2, 3.4

Agreed language in Reciprocal Compensation Section 3.1 provides that each party is responsible for the accuracy and quality of the data it provides to the other (concerning traffic the parties exchange). SBC proposes to include language at the end of Section 3.1 to clarify that each party is responsible only for the accuracy and quality of data relating to traffic that originates on its network, and not for the accuracy and quality of data provided by third party carriers. MCI apparently opposes the addition of SBC's proposed language.

SBC agrees to provide MCI with recorded data relating to traffic that originates on other carriers' networks, but the information in the recordings is and must be the responsibility of the originating company. Where the recorded data that SBC provides to MCI relates to traffic that originates on SBC's network, SBC accepts responsibility for the accuracy and quality of the information. But for information that is originated by a third party and that passes through SBC

to MCI, the originating company is responsible for the quality and accuracy of the information. SBC's proposal reflects industry practice, and for good reason: It is impossible for SBC to guarantee the quality or accuracy of information that originates with third parties and over which SBC has no control.

Although the DPL indicates that MCI opposes SBC's clarifying language for Section 3.1, MCI's witness seems to agree with SBC on this issue. MCI witness Ricca asserts that parties should be required to pass on necessary and relevant data received from third-party originators (a proposition with which SBC does not disagree), but adds, "I am not suggesting that a transiting party has a duty to determine if the information that arrives from the originating party is accurate." Indeed, MCI's Initial Brief indicates that MCI is asking only that SBC pass along the third-party originated data, not that SBC be responsible for its accuracy.

We adopt the language SBC proposes for Section 3.1

RC ISSUE 7A: **SHOULD CPN BE SENT WITH ALL CATEGORIES OF TRAFFIC, INCLUDING SECTION 251(b)(5) TRAFFIC, INTRALATA TOLL TRAFFIC, SWITCHED ACCESS TRAFFIC AND WIRELESS TRAFFIC?**

RC ISSUE 7B: **SHOULD THE ORIGINATING PARTY BE RESPONSIBLE FOR PROVIDING EQUIVALENT SIGNALING DATA TO THE TERMINATING PARTY FOR BILLING PURPOSES IF CPN IS NOT AVAILABLE?**

ICA Reference: Reciprocal Compensation § 3.2

Calling Party Number ("CPN") information allows a carrier that receives traffic from another carrier to determine whether or not the traffic is Section 251(b)(5) traffic, and therefore whether it is subject to reciprocal compensation or to appropriate access charges or a bill and keep arrangement. CPN is a standard part of an SS7 signaling message, and the vast majority of intercarrier traffic contains CPN. In order to accurately jurisdictionalize, rate and bill intercarrier traffic, all calls must include CPN where SS7 connections are available.

SBC proposes that Section 3.2 require the parties to transmit CPN on all traffic they exchange over local interconnection trunks, including Switched Access Traffic and wireless traffic. MCI's proposed language for Section 3.2, in contrast, would require that CPN be provided only for traffic "exchanged pursuant to this Agreement." As we understand SBC's language, however, it seeks to prevent a CLEC from improperly using the parties' local interconnection trunks to exchange traffic that is not within the scope of this Agreement and disguising that fact by not including the CPN. That is, the essential purpose of the SBC language to which MCI objects ("including, without limitation, Switched Access Traffic and wireless traffic") is that if MCI does (improperly) pass such traffic to SBC over the parties' local interconnection trunks, MCI has a contractual obligation to include the CPN so that SBC can see what is happening on its network. With that understanding, SBC's language is reasonable and appropriate, and we adopt it.

MCI notes that CPN is not available in all circumstances, and contends that when it is not, the parties should be allowed to provide equivalent signaling data. There is no need for such a contract provision, however, because another section of the Reciprocal Compensation Appendix addresses the circumstances where CPN is not available. *See* RC Issue 8.

RC ISSUE 8: WHAT TERMS AND CONDITIONS SHOULD GOVERN THE COMPENSATION OF TRAFFIC THAT IS EXCHANGED WITHOUT THE CPN NECESSARY TO RATE THE TRAFFIC?

ICA Reference: Reciprocal Compensation § 3.4

MCI and SBC agree there will likely be some traffic that is passed between their networks without CPN. The parties also agree that when 90% or more of the traffic that either carrier delivers to the other contains CPN, the traffic without CPN – which has to be billed as local or intraLATA toll but cannot be identified as either one without CPN—will be billed as local or intraLATA toll in direct proportion to the Minutes of Use ("MOU") of calls exchanged with CPN information

The parties disagree, however, about what should happen when less than 90% of the traffic that one carrier delivers to the other contains CPN. SBC proposes that when a carrier delivers more than 10% of its traffic without CPN, the terminating carrier should have the option to bill those calls at its intrastate switched exchange access service rate. MCI asserts that the excessive unidentified traffic should instead be compensated based on a Percent Local Usage ("PLU") factor, *i.e.*, that the parties should estimate the percentages of unidentified calls that are local and toll. We adopt SBC's proposal.

SBC's proposal imposes a 10% threshold in order to decrease the opportunity for arbitrage. As discussed above, CPN information is a standard part of an SS7 signaling message. Due to the make-up of today's SS7 systems, the volume of unidentified traffic should be small. The vast majority of carriers' traffic is technically capable of passing CPN information. The minimal unidentified amount reflects occasional software errors where CPN is not generated at call origination or calls are originated off the SS7 network (via a rural multi-frequency network, for example). As long as no one is trying to game the system by intentionally stripping CPN from intraLATA toll calls that originate on its network, the percentage of traffic that does not contain CPN will rarely exceed 10%. Thus, SBC's proposed 10% threshold will have little effect in the normal course of business – but will prevent improper arbitrage.

Conversely, MCI's proposal fails to address two important concerns: (1) traffic deliberately passed without CPN; and (2) traffic passed without CPN by a CLEC lacking motivation to rectify the problem. With respect to the first concern, if all unidentified traffic were billed using PLU, some carriers would have an incentive not to pass CPN information on calls that originate on their networks, even though the information is available. By "stripping" the CPN from their intraLATA toll calls, such carriers would be billed for those calls based on the proxy PLU. This would create an arbitrage opportunity by which carriers could game the compensation regime by paying reciprocal compensation on their intraLATA toll calls instead of the higher access rates that should apply. To reduce the opportunity for arbitrage, PLU should be

used only for the relatively modest volume of traffic (less than 10%) for which it is reasonable to anticipate that CPN is actually unavailable. To allow for a PLU factor to apply for unidentified traffic above a reasonable amount (10%) invites arbitrage opportunities and incentives for carriers to pass CPN on all non-toll calls, and not pass any CPN on toll calls, thereby paying for all traffic at the "proxy PLU of 100%."

MCI's proposal would also leave the parties without any real means to rectify the problem of excessive unidentified traffic. Where SBC's proposed language provides a party one month to correct a condition where it is sending excessive levels of traffic without CPN, MCI proposes language that would continue the PLU treatment for the excessive traffic without CPN during an open-ended exchange of data and correction period. MCI's proposal thus fails to create any incentive for the offending party to cure the problem and resolve the compensation dispute.

For these reasons, SBC's proposed language for Section 3.4 is adopted.

RC ISSUE 9: SHOULD THE RATE FOR RECIPROCAL COMPENSATION BE A UNITARY RATE OR A BIFURCATED RATE?

ICA References: Reciprocal Compensation, § 4.2.5 *et al.*; Price List 592-594 & 1035-1040

Reciprocal compensation rates recover (among other costs) the costs of two functions that are performed by an end office switch: (i) setting up the call, and (ii) keeping the switch port open during the call. The costs for both functions are known (and are not at issue here). The Commission-approved "unitary" rate that SBC currently charges for end office switching is a simple per-minute rate. To calculate it, SBC spread the cost of setting up the call (which is incurred one time per call, regardless of the duration of the call) across the duration of an average call. For example:

Assume it costs 2¢ to set up a call, and 0.1¢ per minute to keep the switch port open. Assume further that the average call lasts five minutes. To determine a unitary rate of the sort that SBC currently charges, one would first calculate the total cost of the average, five-minute call: 2¢ + (5 x 0.1¢) = 2.5¢. Then, one would convert that to a single per/minute rate: 2.5¢ divided by 5 minutes = 0.5¢/minute. That 0.5¢/minute would be the cost on which the end office switching rate would be based. Thus, a two-minute call would be deemed to cost SBC 1¢, a nine-minute call would be deemed to cost SBC 4.5¢, and so on.

That unitary rate is a "fair" rate, on the whole and on the average – assuming the average call duration remains five minutes – even though the charge for some individual calls is "too high," while the charge on other individual calls is "too low." Specifically, the charge for calls shorter than five minutes in duration would be too low, while the charge for calls longer than five minutes in duration would be too high. For example, the charge for a two-minute call would be based on a cost of 1¢, even though the real cost would be 2.2¢ (the 2¢ cost to set up the call plus 0.1¢ for each minute the switch port is held open), while the charge for a nine-minute call would be based on a cost of 4.5¢, even though the real cost would be 2.9¢. As SBC's witness

explained, the charges for the longer-than-average calls are inflated because the set-up cost, which is actually incurred only one time per call, is recovered repeatedly (once every five minutes, in the foregoing example); conversely, the set-up cost for shorter-than-average calls is not fully recovered.

Although the average call duration that was used to calculate SBC's rates was accurate when the calculation was made, the characteristics of telephone calls have evolved dramatically over the past several years. As a result, the benefit of the simplicity provided by the unitary approach is now outweighed by the substantial risk that that approach will result in one carrier or the other being over-compensated or under-compensated in the long run. The way to eliminate this risk is to stop spreading the call set-up cost over the (assumed average) duration of the call, and instead apply the actual call set-up cost once to each call, since the cost is in fact incurred once on each call. And to that one-time set up cost add, for each call, the cost of keeping the switch port open, which is determined by multiplying the duration of the call (in minutes) by the per minute cost (0.1¢) of keeping the port open. With this approach, the rate for the two-minute call described above, which cost 2.2¢ to terminate at the end office switch, would be based on that 2.2¢ cost, and the rate for the nine-minute call described above, which cost 2.9¢ to terminate at the end office switch, would be based on that 2.9¢ cost. This is the bifurcated rate approach that SBC proposes.

It would appear that the bifurcated approach should be uncontroversial, because it indisputably yields more precise costs, and therefore fairer and more accurate rates, than the unitary approach.

MCI opposes a bifurcated rate structure, but for reasons that we find lacking. First, MCI states that "the reciprocal compensation rate should be one that has withstood the tests of regulatory review resulting from a fully litigated proceeding. The rate should be Commission-approved. MCI proposes rates with underlying economic costs that have been documented by, litigated before, and approved by this Commission." That criticism is based on a misconception of SBC's approach. The bifurcated rate structure uses the same economic costs that this Commission has approved and that underlie SBC's current unitary rate structure. The call set-up cost remains the same. The per-minute cost for keeping the switch port open remains the same. All that changes is the arithmetic, and it changes in a way that indisputably yields greater precision.

The Commission find that SBC's proposed bifurcated reciprocal compensation rate will yield more accurate reciprocal compensation charges than SBC's current rate, and that there is no reason to reject SBC's proposal. Accordingly, we adopt SBC's proposal. To ensure that all CLECs in Illinois are subject to the same regime, we direct SBC to invoke its change of law rights with respect to all CLECs with which it has interconnection agreements in this State to implement the bifurcated rate approach we approve here.

RC ISSUE 10A: **BASED ON THE REQUIREMENTS OF 47 C.F.R. 51.711(a)(3), IS MCI ENTITLED TO CHARGE THE END OFFICE SWITCH RATE ONLY?**

RC ISSUE 10B: **IF AN MCI SWITCH MEETS THE GEOGRAPHIC COVERAGE TEST, SHOULD MCI BE ENTITLED TO THE MILEAGE SENSITIVE TANDEM TRANSPORT ELEMENT FOR TRANSPORT BETWEEN SWITCHES WHEN MCI ONLY HAS ONE SWITCH?**

RC ISSUE 11: **DO MCI'S SWITCHES SERVE A GEOGRAPHIC AREA COMPARABLE TO SBC'S TANDEM SWITCHES?**

ICA References: Recip. Comp. §§ 4.4.1, 4.4.1.1, 4.4.1.2. 4.4.2

The question presented by Issue 10A is what rate MCI will charge SBC when MCI terminates on its network a call that originates on SBC's network and that is subject to reciprocal compensation under Section 251(b)(5) – the tandem rate or the end office rate. The answer depends on whether or not MCI has satisfied 47 C.F.R. § 711(a)(3), which provides, "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." Thus, the Commission's decision on this issue depends on whether or not MCI has proven that its switch serves a geographic area comparable to the area served by an SBC tandem switch.

SBC's proposed language for Section 4.4.1.1 includes a specific test to determine whether MCI's switch, in the words of Rule 711(a)(3), "serves a geographic area comparable to the area served by the incumbent LEC's tandem switch." Specifically, in order for MCI to be permitted to charge the tandem rate, MCI should be required to show that its switch (i) provides local dial-tone service to end-users with a minimum of ten different business or residence premises addresses in each of twelve SBC serving wire center areas per LATA; and (ii) terminates less than 75% of its total traffic to each of the twelve SBC serving wire center service areas served by MCI's switch. The twelve SBC wire center service areas are the average number of end offices that subtend an SBC tandem switch. These parameters, when satisfied by a CLEC, demonstrate that the carrier has sufficient facilities-based service in place to serve a geographic area that can be used as a proxy for one of SBC's tandem switches. The test provides a reasonable means for MCI to demonstrate that it serves end users over the area contemplated by the FCC's Rule, so that it is entitled to charge the tandem rate for that qualifying switch in that qualifying LATA, and we therefore adopt SBC's proposed language.

Turning to Issue 10B: Four rate elements make up the tandem interconnection rate: the end office switching rate, the tandem switching rate, and two elements associated with transporting a call between a tandem switch and an end office switch. If an MCI switch satisfies the test set forth in SBC's proposed contract language, MCI would be entitled to charge the same end office switching rate as SBC, the same tandem switching rate as SBC, and the same rate as SBC for one of the two transport elements; the rate for the other transport element, however, would be unique to the MCI. Specifically, one of the two transport elements is "common

transport termination per minute of use"; the other is "common transport facility per minute, per mile." The first transport element – like the two switching elements – applies on a Minute of Use ("MOU") basis. The second element, while also on an MOU basis, is calculated on a mileage basis as well. Because CLECs in almost all instances use one switch to qualify for the tandem interconnection rate in lieu of multiple switches provisioned in a tandem-to-end office hierarchy, there is no mileage basis from which to calculate that rate element because there is no distance between a CLEC's switches. Technically, then with zero mileage, the common transport facility per minute per mile element is rated at zero. Therefore, the CLECs' tandem interconnection rate, totaling all the applicable elements, would be different than the tandem interconnection rate that SBC would apply to the traffic SBC terminates for the CLECs, as SBC' tandem-switched calls traverse a measurable distance between switches.

Given our adoption of SBC's language for Reciprocal Compensation Section 4.4.1.1, discussed above, we cannot determine at this time that MCI's switches serve geographic areas comparable to an SBC tandem switch, because MCI has offered no evidence that purports to satisfy the test set forth in that language. Accordingly, the Commission must reject MCI's proposed language for Section 4.4.2, which states that MCI's switches serve areas comparable to an SBC tandem, and instead adopts SBC's proposed language for Section 4.4.2, which provides that MCI may lay claim to the tandem rate by making that showing in the future.

RC ISSUE 12: SHOULD THERE BE A GROWTH CAP FOR ISP-BOUND TRAFFIC IN ACCORDANCE WITH THE FCC'S ISP COMPENSATION ORDER?

ICA Reference: Reciprocal Compensation § 4.4.3.1

This issue concerns implementation of the *ISP Remand Order*'s growth caps on total ISP-Bound Traffic minutes for which a carrier may receive compensation. The FCC imposed a cap on total ISP-bound minutes for which a LEC may receive" compensation under the FCC's rate caps for ISP-bound traffic. *ISP Remand Order* ¶ 78. Under the FCC's growth caps, for 2001, a LEC could receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, the cap on compensable ISP-bound minutes rose to a ceiling equal to the minutes for which it was entitled to compensation under the agreement in 2001, plus another ten percent growth factor. And for 2003 the ceiling was equal to the 2002 ceiling. *Id.*

We find that SBC's proposed language properly implements the FCC's growth caps, while MCI's does not. For instance, MCI proposes to state that "each Party agrees to cap its overall ISP-bound Traffic minutes of use based upon the 1st Quarter 2001 ISP minutes for which that Party was entitled to compensation . . . ." However, the FCC's growth caps are not caps on "overall ISP-bound Traffic minutes of use," but on compensable ISP-bound Traffic minutes of use, as SBC's language provides. That is, carriers are free to continue to exchange ISP-Bound Traffic minutes of use once the growth caps are exceeded, but are not entitled to compensation under the FCC's rate caps for those additional minutes of use. The FCC was clear that its growth caps affect only the intercarrier compensation (*i.e.*, the rates) applicable to the delivery of ISP-

bound traffic, but do not alter carriers' other obligations." *ISP Remand Order* n.149. MCI's proposed language, however, wrongly suggests that each carrier agrees to cap its traffic (not its compensable traffic) at the FCC's prescribed levels.

MCI also proposes to base the growth caps upon "the 1st Quarter 2001 ISP minutes for which that Party was entitled to compensation" under its then-existing agreement, while SBC proposes to base the growth caps upon "the 1st Quarter 2001 ISP-bound Traffic minutes. SBC clearly has the better of this issue. The FCC's growth caps are not based upon all "ISP minutes," as MCI proposes, but are based upon ISP-bound minutes. *ISP Remand Order* ¶ 78. That is, the growth caps are based on compensable minutes of the ISP-bound traffic addressed by the *ISP Remand Order* – "ISP-bound traffic terminated within a local calling area." *ISP Remand Order* ¶ 24.

RC ISSUE 13: SHOULD ALL OF THE ISP-BOUND MINUTES OF USE COMPENSATED BY THE PARTIES IN CALENDAR YEAR 2004 BE COUNTED TOWARDS THE GROWTH CAP IN CALENDAR YEAR 2004?

ICA Reference: Reciprocal Compensation § 4.4.3.2

Reciprocal Compensation Issue 13 concerns the calculation of the *ISP Remand Order*'s growth caps for 2004. The parties agree that ISP-Bound Traffic minutes of use from the period from June 1, 2004 to December 31, 2004, shall count towards determining whether MCI has exceeded the growth caps. The parties disagree, however, whether ISP-Bound Traffic minutes of use from the first five months of 2004 count.

SBC proposes language (§ 4.4.3.2) that would recognize the parties' disagreement, but defer resolution of the parties' dispute. SBC's proposed language would require resolution of the dispute (first by negotiation, and if negotiations are unsuccessful, by "the appropriate regulatory or judicial authority") only if a party "believes that the other Party's ISP-Bound Traffic has met or exceeded the growth cap in 2004 by counting the ISP-Bound Traffic exchanged for the period from January 1, 2004 to May 31, 2004 towards such growth cap." If no party believes that the growth cap has been exceeded even if ISP-Bound Traffic from the first five months of the year is counted, then there would be no reason to resolve this dispute at this time. SBC's proposal is attractive, because there is no reason for the Commission to resolve a dispute that may turn out to be moot.

MCI has refused to accept SBC's proposed language, and instead proposes language that would exclude ISP-Bound Traffic exchanged in the first five months of 2004 from "count[ing] towards determining whether MCIm has exceeded the growth caps for Calendar Year 2004." MCI § 4.4.3.2. We do not believe the rationale for MCI's proposal holds water, for the reasons SBC set forth in its submissions to us. We need not decide that question now, however, because regardless the merit or lack of merit of MCI's proposal, considerations of administrative efficiency dictate that we not resolve this potential disagreement now, because it is a disagreement that may never need to be resolved. Accordingly, we adopt SBC's language, which makes appropriate provision for the potential agreement to be addressed if the need ever arises.

RC ISSUE 14A: **SHOULD RATES BE SUBJECT TO TRUE-UP UPON THE CONCLUSION OF STATE PROCEEDINGS TO REBUT THE 3:1 PRESUMPTION?**

RC ISSUE 14B: **SHOULD THE DATE FOR RETROACTIVE TRUE-UP OF ANY DISPUTES RELATING TO THE REBUTTABLE PRESUMPTION BE SET AS THE DATE SUCH PARTY FIRST SOUGHT TO REBUT THE PRESUMPTION AT THE COMMISSION?**

ICA References: Reciprocal Compensation §§ 4.8.1, 2.3

Issue 14A concerns implementation the *ISP Remand Order*'s so-called "3:1 ISP presumption." In the *ISP Remand Order* (¶ 79), the FCC recognized "that some carriers are unable to identify ISP-bound traffic." To "limit disputes and avoid costly efforts to identify this traffic," the FCC "adopt[ed] a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation mechanism set forth in [the *ISP Remand Order*]." *Id.* The FCC made clear that the 3:1 ISP presumption may be rebutted in proceedings before the state commission. The FCC also held that: "During the pendency of any such proceedings, LECs remain obligated to pay the presumptive rates (reciprocal compensation rates for traffic below a 3:1 ratio, the rates set forth in this Order for traffic above the ratio), *subject to true-up upon the conclusion of state commission proceedings*." *Id.* (emphasis added).

The parties' dispute focuses on the last sentence quoted above. MCI proposes to track this sentence only in part, stating: "During the pendency of any such proceedings to rebut the presumption, MCIm and SBC Illinois will remain obligated to pay the presumptive rates (reciprocal compensation rates for traffic below a 3:1 ratio, the rates set forth above for traffic above the ratio)." MCI § 4.8.1 That is, MCI proposes to omit the FCC's last phrase ("subject to true-up upon the conclusion of state commission proceeding," and indeed proposes to make no mention in the parties' contract language of a true-up. MCI asserts that in general, rates should not be set retroactively for any reason, unless there has been a violation of the Agreement's terms and conditions." Under the circumstances, however, MCI's policy preferences are irrelevant. The *ISP Remand Order* expressly provides for true-ups, and that federal law cannot be ignored based on MCI's preferences.

SBC proposes contract language providing that the parties remain obligated to pay the "presumptive rates" during the pendency of any state commission proceeding to rebut the 3:1 presumption, "subject to a true-up upon the conclusion of such proceedings." SBC § 4.8.1. SBC's proposed language directly tracks the *ISP Remand Order* and will be adopted.

SBC also proposes language addressing the methodology to be used to calculate any true-up. In particular, SBC proposes that the same method used by the Commission to determine whether the ratio has been rebutted (*i.e.*, to determine which traffic is local traffic delivered to an ISP, and which traffic is local traffic delivered to a non-ISP) also be used to determine the appropriate true-up. SBC § 4.8.1. SBC's proposal is altogether reasonable. It would be unreasonable and inappropriate to use one methodology to identify ISP-bound traffic for

purposes of the 3:1 ratio rebuttal, but then use a different methodology to identify ISP-bound traffic for purposes of a true-up resulting from that 3:1 ratio rebuttal.

On Issue 14B, SBC proposes (and MCI opposes) contract language specifying the date to which a true-up resulting from a 3:1 ISP presumption rebuttal will apply. Specifically, SBC proposes that such true-up shall be retroactive back to the date a Party first sought appropriate relief from the Commission. SBC § 4.8.1. The *ISP Remand Order* clearly implies that a true-up should be retroactive to the time the party seeking to rebut the 3:1 ISP presumption instituted the state commission proceeding. In paragraph 79 of the *ISP Remand Order*, the FCC held that the institution of such a proceeding itself was not enough to relieve carriers of their obligation to pay the "presumption" rates, but a true-up would apply "upon the conclusion of state commission proceedings."

SBC's proposed language, moreover, provides the parties certainty as to the date a true-up will apply. The timing of the true-up should be applied consistently to all carriers, regardless of which party rebuts the presumption. Accordingly, SBC's language is adopted.

RC ISSUE 15: HAS SBC DEMONSTRATED THAT MORE THAN 90% OF THE TRAFFIC IT TERMINATES TO MCI IS ISP-BOUND?

ICA Reference: Reciprocal Compensation § 4.8.1.1

Section 4.8.1.1 of SBC's proposed language states that SBC has demonstrated that more than 90% of the traffic originating from SBC that terminates to MCI's switches is ISP-Bound Traffic, and thus such traffic must be compensated as such. As explained above (Reciprocal Compensation Issue 14), in the *ISP Remand Order* the FCC adopted a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceed a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation mechanism set forth in the *ISP Remand Order*. However, the FCC also held that a carrier may demonstrate to a state commission that traffic it delivers to another carrier is ISP-Bound Traffic, irrespective of the 3:1 presumption. In this proceeding, SBC has demonstrated that more than 90% of the traffic that it delivers to MCI's switches is ISP-Bound Traffic, and thus must be compensated as such.

SBC has the ability to track traffic destined to MCI's network. To determine which traffic is ISP-Bound Traffic and which is Section 251(b)(5) traffic, SBC examines the traffic records for all calls exchanged by the parties, on a quarterly basis, and most recently for the month of June. To identify calls to ISPs, SBC relied on the different characteristics of ISP-bound and typical voice calls. The average voice telephone call is about 4 minutes long, while the average dial-up call to an ISP is about 29-30 minutes long.

First, SBC used a two-prong test to identify MCI telephone numbers that appear to be ISPs. That test identified calls originated by SBC end users and destined to MCI that averaged over 20 minutes in duration, and that were to telephone numbers that received over 5 calls per hour. To confirm which of the identified MCI telephone number were ISPs, SBC then used an auto-dialer to call the MCI telephone numbers that satisfied the two-prong test, to determine whether the answering party was a voice, a fax modem tone, or an ISP modem tone. The results

show that call to ISP modems constitute over 90% of all traffic from SBC to MCI for the test period.

MCI contests none of the SBC evidence that supports the foregoing findings. Because SBC has demonstrated that more than 90% of the calls it originates that are destined to MCI constitute ISP-Bound Traffic, the parties' contract should reflect that fact, as SBC has proposed. Further, should the amount of ISP-Bound Traffic differ in the future, the parties' contract will allow either party to challenge or rebut the 90% provision. Both parties have the right to provide new information at any time while the agreement is in place.

MCI asserts the Commission should not consider this issue because SBC raised the issue belatedly, so that MCI purportedly has not had time to evaluate the issue or SBC's evidence. MCI's position is without merit.

The issue here, whether SBC's proposed contract language should be included in the agreement, is clearly teed up for decision in this arbitration, and must be decided. Indeed, MCI itself teed the issue up: MCI filed the arbitration petition initiating this proceeding, and in that arbitration petition MCI included this Reciprocal Compensation Issue 15 raising the issue whether SBC's proposed Section 4.8.1.1 should be adopted. Moreover, MCI admits in its DPL position statement that it was in receipt of SBC's proposed language at well before MCI filed its arbitration petition. MCI cannot now claim that the issue should not be considered by the Commission.

Moreover, MCI has had every opportunity to evaluate SBC's evidence and to expose it to appropriate type scrutiny. SBC's testimony demonstrating that more than 90% of the traffic it delivers to MCI is ISP-bound traffic is pure, straight-forward factual testimony, and thus was a perfect candidate for meaningful cross-examination. MCI, however, voluntarily waived its opportunity to cross-examine SBC's witness.

In the end, SBC's factual evidence, demonstrating that more than 90% of the traffic that SBC originates and delivers to MCI is ISP-bound traffic, stands unrebutted. Thus, the Commission approves SBC's proposed Section 4.8.1.1.

RC ISSUE 16: **SHOULD INTER-SWITCH UNE-P CALLS BE COMPENSATED DIFFERENTLY THAN OTHER TRAFFIC?**

RC ISSUE 17: **SHOULD INTRA-SWITCH UNE-P CALLS BE EXEMPTED FROM REQUIREMENTS TO PAY RECIPROCAL COMPENSATION?**

ICA References: Reciprocal Compensation §§ 4.10, 4.10.1

We agree with SBC that MCI's contention that the Commission should disregard this issue because the parties did not adequately negotiate it is baseless. MCI filed the petition for arbitration in this case, and MCI requested arbitration of the issues in the DPLs that were attached to it petition, *including these issues*. Furthermore, MCI admits that SBC provided MCI with its proposed contract language on this issue prior to the date on which MCI filed the petition

for arbitration. The notion that the Commission should disregard the issue because SBC allegedly "failed to advise and discuss with MCI the rationale supporting its proposals," as MCI puts it, strikes us as frivolous. Similarly, MCI's request that the Commission decline to decide an issue that indisputably arose out of the parties' negotiations (since SBC proposed its language to MCI during the negotiations and MCI rejected it) and that MCI's petition set forth for arbitration is an improper invitation for the Commission to "fail to carry out its responsibility under this section" (47 U.S.C. § 252(e)(5).) The Commission declines that invitation.

SBC proposes language for Reciprocal Compensation Sections 4.10 and 4.10.1 that clarifies that inter-switch traffic originated or terminated over an end to end circuit provisioned through UNE-P is subject to reciprocal compensation, while intra-switch traffic similarly provisioned is exempted from such compensation. MCI appears to agree that reciprocal compensation applies for the termination of UNE-P traffic. In fact, MCI asserts that all reciprocal compensation traffic should be treated equally, including inter-switch UNE-P calls, and should be paid for by the party whose customer originated the call. MCI disagrees, however, with the language proposed by SBC that clarifies that reciprocal compensation charges do not apply for UNE-P traffic on *intra-switch* calls.

Regardless how an end to end circuit (or UNE-P) is provided, such traffic should be compensated the same as traffic that originates and/or terminates via a facilities-based provider. The Commission-established call termination charges are applicable to Section 251(b)(5) traffic, and not to non-Section 251(b)(5) traffic, regardless how it is provided. Additionally, nothing in the *ISP Remand Order* suggests that traffic originated through UNE-P or any other wholesale arrangement should be treated any differently than facilities-based traffic.

Further, this Commission has previously resolved this issue in a manner that is consistent with SBC's position here. Docket 03-0239 presented the question whether SBC's reciprocal compensation rate should apply to ULS-ST inter-switch traffic termination. We held that it should, because, among other reasons, "there is no evidence to indicate that charges for transport and termination should vary according to whether or not AT&T uses ULS-ST to originate traffic. Barring such evidence, we agree that ULS-ST traffic should be subject to SBC's local reciprocal compensation rate, which leads us to adopt SBC's proposed language." MCI has come forward with no such evidence in this proceeding, either.

The language SBC proposes for Sections 4.10 and 4.10.1 clarifies what has long been the standard compensation mechanism for reciprocal compensation. That is, reciprocal compensation applies to certain calls (Section 251(b)(5) and ISP-Bound calls) that are exchanged between two carriers. That compensation begins at the first point of switching on the other Party's network. *In re Illinois Bell Telephone Co.*, No. 01-0614, 2002 WL 1943561, * 81 (Ill. C.C. June 11, 2002). Sections 4.10 and 4.10.1 conform with this principle. Due to CLEC use of SBC's local switching, a call that is originated and terminated between two carriers where both carriers' end users are homed off the same end office switch is called an *intra-switch* call. In those circumstances, there is no first point of switching on the other Party's network, and as a result, no reciprocal compensation applies. Simply put, there are no costs for the "terminating carrier" to recover. Likewise, a call that is originated and terminated between two carriers where the carriers' end users are homed off of different end office switches is called an *inter-switch*

call. In these circumstances, there is a first point of switching on the other Party's network, and the application of reciprocal compensation is appropriate.

SBC's proposed language in Sections 4.10 and 4.10.1 is adopted.

RC ISSUE 18A: **WHAT ARE THE APPROPRIATE RECORDS SBC WILL PROVIDE MCI IN ORDER FOR MCI TO BILL INTERCARRIER COMPENSATION TO A THIRD PARTY TELECOMMUNICATIONS CARRIER USING AN SBC NON-RESALE OFFERING WHEREBY SBC PROVIDES THE END OFFICE SWITCHING ON A WHOLESALE BASIS AS SET FORTH IN SBC'S PROPOSED 13.1.1??**

RC ISSUE 18B: **UNDER ANY CIRCUMSTANCES SHOULD SBC BE REQUIRED TO PAY INTERCARRIER COMPENSATION ON TRAFFIC THAT ORIGINATES FROM A THIRD PARTY TELECOMMUNICATIONS CARRIER USING AN SBC NON-RESALE OFFERING WHEREBY SBC PROVIDES THE END OFFICE SWITCHING ON A WHOLESALE BASIS AS SET FORTH IN SBC'S PROPOSED 13.1.1? ?**

RC ISSUE 18C: **SHOULD MCI HAVE THE SOLE OBLIGATION TO ENTER INTO COMPENSATION ARRANGEMENTS WITH THIRD PARTY CARRIERS THAT TERMINATE TRAFFIC TO MC WHEN SBC IS THE ILEC ENTITY PROVIDING THE USE OF THE END OFFICE SWITCH (*E.G.*, SWITCHING CAPACITY) TO SUCH THIRD PARTY CARRIER, AND IF IT DOES NOT ENTER INTO SUCH ARRANGEMENTS, SHOULD IT INDEMNIFY SBC WHEN THE THIRD PARTY CARRIERS SEEK COMPENSATION FROM SBC?**

ICA References: Reciprocal Compensation §§ 4.11, 13.1.1

Issue 18 concerns the situation where MCI is exchanging traffic with a third party carrier (a "TPC") that is serving customers with SBC's switch. When MCI terminates Section 251(b)(5) traffic that originates with the TPC's customers, MCI is entitled to charge the TPC reciprocal compensation. If MCI is not somehow informed that the calls are originating with the TPC's customers, however, the calls would appear to MCI to be originating with SBC customers, since the calls is originating at SBC's switch; nonetheless, of course, MCI cannot properly charge SBC reciprocal compensation, because the originating customer is the TPC's, not SBC's.

The parties agree that SBC will provide MCI with the records it needs in order to identify and bill the TPC in the situation just described. There is no disagreement on this basic point – and Issue 18A as stated above does not really capture any difference between the parties'

proposals, neither of which specifies exactly what sort of records SBC will provide. The real disagreement arises our of MCI's proposal for what should happen in the event that SBC does not provide MCI with the call records that identify the TPC as the originating carrier. MCI's proposal is that in that eventuality, "MCIm shall bill SBC ILLINOIS as the default originator of the traffic." We reject that proposal. There is no basis in law or reason for shifting to SBC the TPC's duty to pay MCI reciprocal compensation if SBC does not give the "appropriate call records" to MCI, especially because it would in all likelihood be because the TPC did not provide them to SBC, not because of any failing on SBC's part. That is why SBC's competing contract language provides that it is MCI's duty to enter into appropriate arrangements with the TPC. The answer to Issue 18B, then is no, SBC can never properly be required to pay reciprocal compensation to MCI for calls that originated with the TPC's customers; and the answer to Issue 18C is yes, it is MCI's obligation to enter into appropriate arrangements with TPCs governing traffic that MCI exchanges with TPCs that use SBC's switches to serve their customers.

MCI contends that by proposing language to the effect that it is MCI's duty to enter into appropriate intercarrier compensation arrangements with TPCs, SBC is trying to dictate to MCI how MCI conducts its business with third parties. We disagree. The point of SBC's language is not that MCI has a contractual obligation to SBC to enter into compensation arrangements with TPCs, but that if MCI for whatever reason does not do so, SBC will not be held responsible for the consequences. In particular, if MCI fails to enter into an arrangement with a TPC that ensures that the TPC pays MCI reciprocal compensation for Section 251(b)(5) traffic that originates with the TPC's customers and that MCI terminates, SBC will not under any circumstances be treated as the "default originator" or otherwise be held responsible for the reciprocal compensation the TPC owes MCI. Thus, SBC is willing to take on the obligation to pass the appropriate call records to MCI – and SBC's language so provides – but if SBC is for some reason fails to do that, that does not, as MCI proposes, make SBC the "default originator" of the traffic; MCI must still look to the TPC for the compensation that is due. We find this an appropriate and reasonable approach to the issue. Accordingly, we adopt SBC's proposed language for Sections 4.11 and 13.1.1.

RC ISSUE 19: SHOULD MCI BE ABLE TO CHARGE AN ACCESS RATE HIGHER THAN THE INCUMBENT?

ICA Reference: Reciprocal Compensation § 5.1

The Commission resolved this issue in favor of SBC in Docket No. 01-338, and it adheres to that precedent. The issue concerns the switched access rate that MCI will charge SBC when MCI terminates on its network intraLATA toll traffic that SBC hands off to MCI. SBC proposes that MCI not be allowed to charge SBC a rate that exceeds SBC's tariffed terminating switched access rates. MCI opposes SBC's proposed language, and asserts it should be free to charge its own intrastate switched access tariff rate, whatever it may be.

MCI, in effect, is asking the Commission to require SBC to pay MCI a per/minute access rate that MCI has supported with no evidence, that may or may not be cost-based, that is unregulated, and that MCI may change at any time. We reject MCI's request, for the same reason that we rejected the same request when we entertained it in Docket 01-338.

First, the record in this case does not contain any evidence as to what MCI's switched access tariffed rates are, or whether they are cost-based, or whether they are same as its interstate access rates. What is clear is that MCI is free to change its intrastate switched access tariff rate at any time without SBC or Commission approval.

MCI claims it should be allowed to charge these rates because those are the rates in its tariff, but that argument ignores not only our decision in 01-338, but also the FCC's thinking, as expressed in its Seventh Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 96-262, *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers* (rel. April 27, 2001). There, the FCC found, among other things, that

- Application of the FCC's tariff rules to CLEC access services must be limited "in order to prevent use of the regulatory process to impose excessive access charges" (Order ¶ 2);
- Some CLECs have used the tariff system "to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness. These CLECs have then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate. (*Id.*);
- The FCC needed "to eliminate regulatory arbitrage opportunities that previously have existed with respect to…CLEC access services." (*Id.* ¶ 3);
- CLEC access rates should "decrease over time until they reach the rate charged by the incumbent LEC." (*Id.* ¶ 4);
- The FCC's previous regime "has often failed to keep CLEC access rates within a zone of reasonableness." (*Id.* ¶ 25);
- "[C]ertain CLECs…have refused to enter meaningful negotiations on access rates, choosing instead simply to file a tariff and bind [those] receiving their access service to the rates therein." (*Id.* ¶ 28);
- "[T]here is ample evidence that the combination of the market's failure to constrain CLEC access rates [and other factors] create an arbitrage opportunity for CLECs to charge unreasonable access rates." (*Id.* ¶ 34).

In light of this indictment by the FCC of CLEC access rates, and in light of our decision in No. 01-338, MCI has offered no legitimate basis for requiring SBC to pay MCI's proposed rates. Instead, SBC should pay MCI SBC's own tariffed switched access rates.

Further, there is a compelling logic to SBC's proposal: under the FCC's rules, SBC pays MCI reciprocal compensation for local traffic at rates equal to the rates that SBC charges MCI for terminating MCI-originated traffic. 47 C.F.R. § 51.711. The principal rationale for Rule 711 is that SBC's costs for transporting and terminating local traffic are a reasonable proxy for MCI's costs for performing the same functions. *Local Competition Order* ¶ 1085. That same rationale, applied to intraLATA toll traffic, leads to the conclusion that SBC tariffed switched

access rates are a reasonable proxy for the rates that MCI should charge SBC for performing the same service.

RC ISSUE 20: WHAT BILLING ARRANGEMENTS SHOULD APPLY TO INTRALATA INTEREXCHANGE TRAFFIC?[2]

ICA References: Reciprocal Compensation §§ 9.1, 9.4

Section 9.1 begins by saying, "IntraLATA Interexchange traffic, not considered ***mandatory*** [MCI's proposed word] EAS traffic and carried on the jointly-provided ILEC network is considered as IntraLATA Toll traffic and is subject to access charges." The only difference is that MCI proposes to include the word "mandatory." The word should not be included, because there is no mandatory EAS traffic in Illinois. MCI, having had this brought to its attention, does not disagree, but argues its word should be included just in case that changes. That argument falls flat. If EAS traffic ever does become mandatory – and MCI offers no reason to believe it will – it will still be EAS traffic, so Section 9.1 will still apply, even though it does not include the superfluous, and currently inaccurate, word that MCI proposes to include.

At the end of Section 9.1, MCI proposed to say that traffic in question – IntraLATA Interexchange traffic – would be subject to Section 11 of the Reciprocal Compensation Appendix (which concerns meet point billing), while SBC proposed to say it would be Subject to Section 13 (which concerns billing arrangements for mutual compensation). MCI now seems to have yielded on this point; it acknowledges that it "may have understood section 9 . . . to refer to traffic carried by IXCs," and that that was a "misunderstanding." MCI Init. Br. at 67. We accept SBC's proposal on this aspect of the issue.

MCI's acknowledgement, and our resolution, applies equally to the language MCI previously proposed for Section 9.4. As SBC pointed out, that language is not applicable here; it referred to an outdated method of handling Meet Point Billing records, and no language is needed here regarding the timing of usage delivery for IntraLATA interexchange traffic.

RC ISSUE 21: IS IT APPROPRIATE TO INCLUDE TERMS AND CONDITIONS FOR "SPECIAL ACCESS" AS A DEDICATED PRIVATE LINE SERVICE IN THE RECIPROCAL COMPENSATION APPENDIX?

ICA Reference: Reciprocal Compensation § 11.12

MCI proposes a Reciprocal Compensation Section 11.12 to address whether the parties should follow MECAB guidelines for billing special access and meet-point traffic. We reject MCI's proposal, for several reasons.

First, the Reciprocal Compensation Appendix contains terms for the treatment of intercarrier *traffic*, not facilities. That subject is covered elsewhere in the ICA.

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[2] SBC uses MCI's Issue Description for this issue rather than SBC's, because now that MCI has clarified its position (as we discuss in the text), MCI's Issue Description is satisfactory.

Second, special access is unrelated to intercarrier traffic. Special access provides a dedicated private line service that provides a point-to-point connection between two parties. This connection does not use the Public Switched Telephone Network. Intercarrier compensation is not applicable to special access because both end points of a special access circuit are on one party's network, rather than between two parties' networks. Therefore, traffic which traverses that private lines service is not intercarrier traffic, and its inclusion in this appendix would be inappropriate.

MCI asserts that the parties should follow MECAB guidelines for calculating special access compensation, as these guidelines provide the only national standard that covers joint billing of special access facilities. If MCI wishes to purchase special access from SBC, however, there are other, more appropriate references from which to determine the proper terms, conditions and pricing of that service.

RC ISSUE 23A: **WHAT IS THE PROPER ROUTING, TREATMENT AND COMPENSATION FOR SWITCHED ACCESS TRAFFIC INCLUDING, WITHOUT LIMITATION, ANY PSTN-IP-PSTN TRAFFIC AND IP-PSTN TRAFFIC?**

RC ISSUE 23B: **IS IT APPROPRIATE FOR THE PARTIES TO AGREE ON PROCEDURES TO HANDLE INTEREXCHANGE CIRCUIT-SWITCHED TRAFFIC THAT IS DELIVERED OVER LOCAL INTERCONNECTION TRUNK GROUPS SO THAT THE TERMINATING PARTY MAY RECEIVE PROPER COMPENSATION?**

ICA References: Reciprocal Compensation §§ 16, 16.1, 16.2, 16.3 (and NIM §§ 25.1, 25.2, 25.3, 25.4)

Voice over Internet Protocol ("VoIP") describes a voice communication that "traverses at least a portion of its communications path in an IP packet format using IP technology and IP networks." Order, *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (FCC rel. April 21, 2004) ("*Access Avoidance Order*"), ¶ 3. Numerous carriers – including MCI – are actively developing and marketing new services that use IP technology, including VoIP services. The dramatic growth of VoIP services raises new inter-carrier issues, including the proper treatment of such traffic for transport and termination purposes.

MCI proposes that the Commission ignore VoIP. That would be unreasonable, given that VoIP services are expected to grow dramatically over the term of the ICA. SBC proposes a sensible way to address these new services: essentially, SBC proposes that VoIP be treated just like any other traffic, consistent with the FCC's existing rules, unless and until the FCC changes those rules. As provided in SBC's proposed Section 16.1 of the Appendix Reciprocal

Compensation,[3] if VoIP traffic is "local," then it should be delivered over the local/intraLATA trunks and should be subject to reciprocal compensation rates. If it is non-local, then it should be exchanged over access trunks and should be subject to access charges. SBC's proposed language, consistent with the FCC's current regulations, provides that two types of interexchange VoIP traffic (called PSTN-IP-PSTN traffic and IP-PSTN traffic) (1) must be terminated over the same feature group access trunks used for other interexchange (*e.g.*, long distance) traffic and (2) remain subject to the same access charges that generally apply to other interexchange traffic, when that VoIP traffic originates and terminates in different exchanges. Section 16.2 addresses what happens if VoIP traffic is mis-routed over the wrong trunks (if, after notice, the mis-routing is not corrected in 60 days, the parties will jointly take the dispute to the Commission); and Sections 16.3 provides that if the party delivering the traffic affirmatively shows that the traffic is "IP traffic," then the delivering party will place the traffic on separate access trunk groups.

The FCC is currently considering the proper treatment of IP-based services, including VoIP traffic, in a rulemaking proceeding. Once the FCC issues its ruling, the parties may need to adopt new contract language (using the change of law process). Until that time, however, SBC's proposal is a sensible approach and complies with the FCC's current regulations. MCI's proposal that the Commission not even address these issues, and instead allow the parties to fend for themselves in the area of VoIP traffic, is unreasonable and would make for poor public policy.

MCI also offers an alternative proposal, *i.e.*, to alter existing trunking and compensation mechanisms so that it could use IP-based services to avoid the payment of access charges. In particular, MCI proposes adoption of a new intercarrier compensation regime subjecting all VoIP services to the reciprocal compensation rate that applies to local ISP-bound traffic, regardless of the locations of the calling and called parties, and regardless of the originating and terminating NPA/NXXs – that is, even where the calling and called parties are located in different exchanges within the State or even in different states. MCI also proposes that the parties' contract re-define all VoIP services as "enhanced" services that are to be exchanged over the same interconnection trunk groups used to exchange local traffic. MCI's alternative proposal is inconsistent with the FCC's regulations and is rejected.

PSTN-IP-PSTN traffic: "PSTN-IP-PSTN" traffic (or "IP in the middle" traffic) is traffic that originates on a local exchange carrier's public switched telephone network ("PSTN"), is delivered to an interexchange carrier ("IXC"), is transported by the IXC and/or other interexchange carriers across their networks, and is delivered to a different exchange for termination over a local exchange carrier's PSTN – just like an ordinary long distance call. The only distinction is that, instead of transporting the traffic in a circuit-switched format between the two PSTN exchanges, the IXC converts the call to IP format for transport across its network, and then reconverts that traffic back to the circuit-switched format before delivering it to the terminating PSTN exchange. While MCI suggests that this distinction somehow operates to exempt such traffic from switched access charges, the FCC has already conclusively ruled in the

[3] SBC's proposed contract language in Appendix NIM § 25 and Appendix Reciprocal Compensation § 16 is substantively identical. The minor differences are inadvertent, and in case of doubt, the language in the Appendix Reciprocal Compensation should control.

Access Avoidance Order that this is a distinction without a difference, and that interexchange PSTN-IP-PSTN traffic is subject to the same switched access charges as traditional interexchange calls. There, the FCC held that PSTN-IP-PSTN services are "telecommunications services," not "enhanced" services, and that interexchange carriers who carry such traffic must pay applicable access charges.

In that proceeding, AT&T had petitioned the FCC for a declaration that its "phone-to-phone IP telephony services" were exempt from access charges. *Access Avoidance Order*, ¶ 1. The services at issue used IP only in the middle: an interexchange call was "initiated in the same manner as traditional interexchange calls." That is, once the call "reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone," and "AT&T then converts the call back from the IP format and delivers it to the called party through [the LEC's PSTN]." *Id.* "[U]nder the current rules," the FCC squarely held, such a service "is a telecommunications service upon which interstate access charges may be assessed." *Id.*

Among other things, the FCC concluded that, if PSTN-IP-PSTN traffic were not subject to access charges, carriers would convert to IP networks merely to take advantage of the cost advantage afforded to voice traffic that is converted, no matter how briefly, to IP and exempted from access charges. *Id.* ¶ 18. That would inappropriately create artificial incentives for carriers to convert to IP networks, when "IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges. And that, we find, is what MCI's proposed contract language attempts to accomplish.

Consistent with the FCC's *Access Avoidance Order*, the ICA should explicitly reflect the FCC's determination that access charges apply to interexchange PSTN-IP-PSTN traffic, and prohibit access charge avoidance.

IP-PSTN traffic: "IP-PSTN" traffic of an interexchange nature is also subject to access charges under the FCC's existing access charge regime. IP-PSTN traffic is traffic that originates from the end user's premises in IP format and is transmitted in that format to the switch of its service provider. The service provider then converts the traffic to circuit-switched format, and delivers the traffic to a local exchange carrier for termination on the circuit-switched PSTN. In other words, one end of the call is on an IP network, and the other end is on the PSTN. Because such traffic terminates on the PSTN, it is subject to access charges.

As the FCC stated in Notice of Proposed Rulemaking, *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 (FCC rel. March 10, 2004) ("*IP-Enabled Services NPRM*") (¶ 61), "[a]s a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways." That policy is applicable here. Interexchange IP-PSTN traffic may originate on an IP network, but it is sent to the PSTN like any other interexchange traffic, and it should be subject to the same compensation obligations as any other interexchange traffic. If MCI provides interexchange IP-PSTN services, it should not be allowed to escape sharing the cost of the PSTN with other interexchange carriers that use the PSTN in similar ways. In other words, where a carrier using IP technology "obtains

the same circuit-switched interstate access . . . as obtained by other interexchange carriers" in order to terminate traffic on the PSTN, its service "imposes the same burdens on the local exchange as do circuit-switched interexchange calls," and "[i]t is reasonable that [the carrier] pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN." *Access Avoidance Order*, ¶ 15.

MCI takes the position that IP-PSTN services (and all other VoIP services) are enhanced services, not telecommunications services, and are thereby exempt from access charges. But we need not address whether IP-PSTN services (or PSTN-IP-PSTN or other VoIP services) are enhanced services, because the FCC is currently considering that issue in its *IP-Enabled Services NPRM* (¶¶ 43, 61-62). That decision will likely establish the operating rules for the industry.

Contrary to MCI's suggestion, the FCC has not exempted all enhanced services from access charges. The FCC created the "ESP exemption" to excuse ISPs from certain access charges, in order to kick start the ISP industry. That exemption, however, applies only to an ISP's use of the PSTN as a link between the ISP and its subscribers. A traditional (non-VoIP) ISP-bound call uses the PSTN only as a link between an end user and its ISP to obtain access to the ISP's information service (*e.g.*, for Internet access). The FCC exempted ISPs from access charges for such calls, where the calls are delivered from the ISP's subscribers to the ISP's location in the exchange area. *Id.* ¶ 78. As the FCC subsequently described its ESP exemption, that exemption carves ISPs out from the access charge obligation when they "use incumbent LEC networks to receive calls from their customers." *Access Charge Order*, ¶ 343. In other words, the FCC "determined that exempted enhanced service providers (ESPs) should not be subjected to *originating* access charges for *ESP-bound* traffic." *IP-Enabled Services NPRM* ¶ 25 (emphases added).

The interexchange IP-PSTN traffic at issue here, on the other hand, is not merely a connection between an ISP and its own end user customers. Rather, such traffic uses LEC switching facilities and the PSTN to deliver plain old circuit-switched telephone calls to non-customers. In other words, this VoIP traffic is *not* "ESP-bound," but is bound for the PSTN in the exact same fashion as a traditional long distance telephone call. Similarly, a carrier providing these VoIP services does not merely "use incumbent LEC networks to receive calls from their customers" (First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997) ("*Access Charge Order*"), ¶ 343), but uses the PSTN to terminate calls from their customers to non-customers in other exchanges, just like traditional long distance telephone calls. In short, the FCC's limited ESP exemption simply does not apply to VoIP services that, like interexchange IP-PSTN services and unlike traditional ISP-bound calls, terminate on the PSTN as circuit-switched voice traffic.

Finally, the Commission does not have the discretion in this proceeding to create a new exemption from the FCC's existing access charge regime for VoIP interexchange traffic that terminates on the PSTN. Section 251(g) of TA96 freezes the access charge rules for interexchange traffic that were in effect as of the enactment of the 1996 Act, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the [FCC] after such date of enactment." 47 U.S.C. § 251(g). As explained above, those pre-existing FCC rules require the application of access charges to both PSTN-IP-PSTN and IP-PSTN traffic, and thus those rules must continue to apply until expressly superseded by the FCC. While the FCC is

currently considering possible revisions to existing access charge obligations with respect to VoIP traffic in its *IP-Enabled Services NPRM*, until the FCC adopts such revisions, the parties' contract must reflect the *status quo*, which SBC's proposed contract language does – and which MCI's proposed language does not.

For all the reasons discussed above, the Commission approves SBC's proposed language addressing the treatment of VoIP traffic, and rejects MCI's.

Routing Arrangements: For the reasons explained above, interexchange PSTN-IP-PSTN and IP-PSTN traffic should be routed over feature group trunk groups, as SBC proposes, and not local interconnection trunk groups, as MCI proposes. Local interconnection trunk groups are not intended for access traffic, and do not permit SBC to bill access charges. If MCI were allowed to use local interconnection trunk groups to route interexchange PSTN-IP-PSTN and IP-PSTN traffic, MCI would be able to evade tariffed switched access charges, would avoid paying the same rates as carriers who do not inappropriately attempt to avoid access charges, and would avoid paying proper compensation for use of SBC's local exchange carrier network. In the FCC's words, PSTN-IP-PSTN and IP-PSTN calls "impose[] the same burdens on the local exchange as do circuit-switched interexchange calls," and thus "[i]t is reasonable that [MCI] pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN." *Access Avoidance Order* ¶ 15.

SBC also proposed language specifying the procedures to be used if a third party inappropriately delivers interexchange circuit-switched traffic over local interconnection trunk groups. In such a case, the terminating party may deliver a written objection to such improper delivery, and both parties will work cooperatively to remove such traffic from the local interconnection trunk groups, with further recourse to the Commission in the absence of timely resolution of the problem. SBC's proposed language is lawful and reasonable, and should be incorporated in the parties' agreement. This language does not allow any party to engage in self-help, but requires cooperative, joint action by SBC and MCI, followed, if necessary, by Commission intervention. Ensuring the proper delivery of interexchange circuit-switched traffic is essential in order to enable to parties to obtain proper terminating access charges associated with such traffic.

RC ISSUE 24: IS IT APPROPRIATE TO INCLUDE A SPECIFIC CHANGE OF LAW PROVISION TO ADDRESS THE FCC'S NPRM ON INTERCARRIER COMPENSATION?

ICA Reference: Reciprocal Compensation § 17.1

When the FCC issued its *ISP Remand Order*, it acknowledged that market distortions in the intercarrier compensation regime would not be completely resolved by the rules it promulgated in that Order, and so also issued a Notice of Proposed Rulemaking ("NPRM") to address intercarrier compensation on a more general basis. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking (rel. April 27, 2001). When the FCC establishes that unified intercarrier compensation regime, it may very well affect the parties' intercompensation arrangements in dramatic ways. Accordingly, in order to ensure a smooth transition, this ICA should

acknowledge the NPRM, and should include SBC's proposed Section 17.1 in order to specify how any changes resulting from the FCC's anticipated Order in that proceeding will be implemented.

RC ISSUE 25: SHOULD NON-251/252 SERVICES SUCH AS TRANSIT SERVICES BE NEGOTIATED SEPARATELY?

ICA Reference: Reciprocal Compensation § 7.1

Alternative 1

Not every disagreement between carriers who are making an interconnection agreement is subject to arbitration under Section 252 of the 1996 Act. The issues that are subject to arbitration are those that arise out of the parties' negotiations concerning the "terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251](a) and this subsection [(c)]." 47 U.S.C. § 251(c)(1). In other words, if the issue has to do with the duties described in Section 251 of the 1996 it is arbitrable; otherwise, it is not. This is confirmed by Section 252(c) of the 1996 Act ("STANDARDS FOR ARBITRATION"), which provides that in resolving the arbitration issues, the State commission must "ensure that such resolution . . . meet[s] the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251" and "establish any rates for interconnection, services, or network elements according to subsection [252](d)." The issues that are subject to arbitration, in other words, are those issues, and only those issues, that can be resolved by looking to the substantive requirements of the 1996 Act and the FCC regulations implementing those requirements. If those sources provide no basis for deciding the question, it is not an arbitrable issue. Still, the universe of arbitrable issues is large, because the 1996 Act requires interconnection, network elements and collocation to be on terms and conditions that are "just, reasonable and nondiscriminatory" (*see* 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3), 251(c)(6)), so that if the question is whether something is a just, reasonable or nondiscriminatory term or condition of any of those things, the question is arbitrable. But the universe is not infinite. In particular, Section 252 plainly does not authorize State commissions to arbitrate questions about things that are not required by Section 251 or 252.

SBC contends that this includes transiting, which this Commission has consistently held is not required by the 1996 Act. We agree. As our precedents hold, the 1996 Act requires SBC to provide "interconnection with the local exchange carrier's network." 47 U.S.C. § 251 (c)(2). It does not require SBC to furnish a connection between MCI's network and the networks of third parties. There is no mention of transiting anywhere in the 1996 Act or in the *Local Competition Order*. Moreover, any contention that an incumbent carrier's duty to provide interconnection with its own network implies a duty to provide transiting to third party networks was foreclosed by the *Local Competition Order*, in which the FCC concluded (¶ 176) that, "the term 'interconnection' under section 251(c)(2) refers *only* to the *physical linking* of two networks for the mutual exchange of traffic" (emphasis added) *and* that interconnection does *not* include the transport or termination of traffic. *Id.*

Furthermore, the 1996 Act does not appear to contemplate the use of incumbent LECs' networks as bridges between other local networks. Section 251(a)(1) requires *all*

telecommunications carriers, not just ILECs, to interconnect their facilities and equipment. It provides, "Each telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Thus, if MCI wishes to exchange traffic with a third party carrier, the statute requires MCI and that carrier to interconnect. It requires nothing of SBC with respect to such traffic. If Congress had wanted to make transiting a statutory duty, it could readily have required each carrier to facilitate indirect interconnection between other carriers. Congress included no such requirement in the 1996 Act.[4]

Consistent with those principles this Commission has consistently recognized that the 1996 Act does not require transiting. *See* Arbitration Decision, *AT&T Communications of Illinois, Inc., Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois,* Docket Nos. 96 AB-003 *et al.*, at.10; Arbitration Decision, *Sprint Communications L.P., d/b/a Sprint Communications Company, L.P., Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech, Illinois,* ICC Docket No. 96 AB-008, at 11.

From that it follows that terms and conditions for transiting are not subject to arbitration, and that the contract language that MCI proposes concerning transiting should not be included in the ICA.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed language in the Transit Traffic Service Appendix and the Transit Traffic rates provided in the Transit Services Appendix Pricing, for the reasons set forth above in our resolution of NIM Issue 31.

RESALE ISSUE 1: MAY MCI RESELL, TO ANOTHER TELECOMMUNICATIONS CARRIER, SERVICES PURCHASED FROM APPENDIX RESALE?

ICA Reference: Resale § 1.3

SBC proposes language that permits MCI to resell SBC's telecommunications services to another carrier only for that carrier's use as a retail end user. MCI proposes that the agreement contain no limitations on its ability to resell service to other carriers. Staff supports SBC's proposal with several modifications. For the reasons explained below, we adopt SBC's proposal.

Section 251(c)(4)(A) of the 1996 Act requires SBC to offer for resale, at wholesale rates, "any telecommunications service that [the ILEC] provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A). Section 251(c)(4)(B) prohibits ILECs from imposing unreasonable or discriminatory conditions on resale but allows a state

[4] "Indirect interconnection" means the obligation to terminate traffic provided indirectly from another carrier. That is, if MCI serves as an intermediary and transports traffic to SBC that originates on AT&T's network, SBC is "indirectly interconnected" to AT&T when it accepts that traffic for termination. SBC Ex. 2.0 (Albright) at 44. It means nothing more than this.

commission to prohibit a reseller that purchases a service "that is available at retail only to a category of subscribers from offering such service to a different category of subscribers." 47 U.S.C. § 251(c)(4)(B). The FCC's *Local Competition Order* (¶ 964) reiterates that restrictions on the category of subscriber to which resale can occur are allowed only if they are "reasonable and nondiscriminatory," to avoid restrictions that "could fetter the emergence of competition."

End users and telecommunications carriers are different categories of subscribers. As a result, Section 251(c)(4)(B) clearly gives the Commission the authority to impose the restriction that SBC proposes. Moreover, we find that the restriction SBC proposes is reasonable. SBC witness Pellerin identified a number of potential problems flowing from MCI's desire to have no restriction on its ability to resell to other carriers. These problems include cross-class selling in violation of the *Local Competition Order*, provision of service by uncertificated carriers, and violation of various provisions of the SBC/MCI Agreement. Staff found that SBC's proposed restriction is not inherently unreasonable or inappropriate.

Restrictions on MCI's ability to resell to other carriers would do nothing to "fetter the emergence of competition." MCI's proposal actually would hurt competition by providing CLECs with an arbitrage opportunity that would only benefit themselves because they could pay wholesale, rather than retail, rates when acting as an end user of retail services.

We find that MCI's arguments are either incorrect or irrelevant, as demonstrated by the testimony of Staff witness Liu and SBC witness Pellerin. MCI asserts that SBC's proposed restriction is unlawful because the prohibitions on selling wholesale residential service to business customers and on selling wholesale Lifeline service to ineligible customers represent the sum total of permissible resale restrictions. That is plainly wrong. As noted above, Section 251(c)(4)(B) of the 1996 Act gives state commissions authority to impose other restrictions on cross-class reselling. In fact, Dr. Liu stated that she knew of no support for the position espoused by Mr. Price.

Second, MCI asserts that the FCC's admonition, that resale restrictions should not fetter competition, confirms that cross-selling restrictions should be very limited. But MCI fails to show how a prohibition on reseller chains would harm MCI, end users, or competition – especially since resellers can purchase the same service that MCI wants to sell, directly from SBC and at the same wholesale-discounted rate.

Third, MCI asserts that SBC's proposed restriction is unlawful because Section 251(b)(1) prohibits MCI from refusing to resell, to other carriers, services purchased from SBC at wholesale rates. But any resale obligation imposed by Section 251(b)(1) can apply to MCI only at the retail level, since it has no obligation under Section 251(c)(4)(1), as SBC does, to resell service at wholesale rates. The dispute here is not about MCI's ability to resell at retail rates.

Fourth, MCI asserts that Section 13-801(f) of the Public Utilities Act gives it the right to resell telecommunications services as it sees fit. MCI's claim of unrestricted resale authority under state law goes too far. MCI's sweeping assertion ignores the resale limitations imposed by federal law that even MCI acknowledges earlier in its testimony. Moreover, the similarity in language between Section 13-801(f), on the one hand, and Sections 251(c)(4)(A) and

251(c)(4)(B), on the other hand, strongly suggests that the state law provision conveys no different rights than those provided by federal law. Both statutes allow the imposition of reasonable and non-discriminatory restrictions on resale, which is exactly what SBC proposes here.

Staff recommends adoption of SBC's language, but also recommends that the Commission impose additional restrictions to prevent the "undesirable effects" of MCI's resale to other carriers. Staff's proposal raises two concerns: (1) it is unclear how SBC's proposed language for Section 1.3, which Staff endorses, would mesh with the additional restrictions Staff proposes; and (2) Staff's restrictions may not limit completely CLECs' ability to obtain discounted services for their own use. In particular, CLECs may still be able to work together to obtain such services at the wholesale discount. Because of these concerns, we cannot follow Staff's recommendation.

Accordingly, the Commission adopts the proposed language for Section 1.3 set forth in Ms. Pellerin's testimony. The restriction SBC proposes is reasonable and non-discriminatory, it is simple to administer, and it avoids the possibility that Staff's proposal contains hidden loopholes that ingenious CLECs could exploit.

RESALE ISSUE 4: SHOULD MCI BE PERMITTED TO AGGREGATE TRAFFIC FOR MULTIPLE END USER CUSTOMERS ONTO A SINGLE SERVICE?

ICA References: Resale §§ 4.11, 8.1, 8.2.6, 8.2.7

SBC proposes language that permits MCI to resell SBC's retail services, but only under the same terms and conditions as provided in SBC's tariffs. MCI proposes language that would permit it to share service across multiple unaffiliated end users, without regard to how SBC sells the corresponding retail service to its ends users. Staff supports SBC's proposal, which we adopt.

Section 251(c)(4) of the 1996 Act imposes on SBC a duty to offer for resale, at wholesale rates, "any telecommunications service that [SBC] provides at retail to subscribers who are not telecommunications carriers." The FCC's regulations clarify that an ILEC such as SBC need offer to a CLEC only the same services that the ILEC provides at retail. *See* 47 C.F.R. § 51.603(b) (stating that ILECs must provide services for resale "that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the ILEC provides these services to others.") The *Local Competition Order* provided even clearer guidance that a reselling CLEC must mirror the service offering that the ILEC provides, not change it (at ¶ 332): [C]arriers reselling incumbent LEC services are limited to offering the *same service* an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The *only means* by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service."

We find that SBC's language does what the 1996 Act and the FCC's rules and orders require: it is consistent with the SBC resale tariff. That tariff provides that aggregation of

service is permissible only to the extent that it is consistent with the corresponding retail tariff. SBC's proposal for Section 4.1 of the Agreement accordingly allows sharing or aggregation of service only where permitted by tariff. Similarly, SBC's resale tariff prohibits the aggregation of multiple end users onto a single service. SBC's proposal for Section 8.1 of the Agreement thus allows Centrex service to be offered to end users only in a manner consistent with SBC's tariff.

MCI's language, however, would allow MCI to share service among multiple end users or to aggregate multiple customers onto a single service. MCI thus would be able to offer products that are actually different from any product SBC offers: for example, a Centrex system that served unaffiliated business and residential end users at different locations throughout the state. MCI supports its position through a series of assertions, each of which we find incorrect or irrelevant, as demonstrated by the testimony of Dr. Liu and Ms. Pellerin, by several court or commission decisions, and by MCI's own testimony.

MCI asserts that SBC has failed to rebut the FCC's presumption that resale restrictions are presumptively unreasonable. But what is at issue here is not a resale "restriction" at all; it is the definition of the service being provided. Requiring a reseller to abide by the limitations that are imposed on SBC's retail customers is not a restriction on resale so much as a provision specifying what resale means." Moreover, even if a resale "restriction" were at issue, a state commission can permit such a restriction if it finds the restriction is reasonable and non-discriminatory – as we do here.

MCI asserts that aggregation without regard to end user or geographic criteria does not change the nature of the service. SBC does not sell Centrex service to unaffiliated end users, however. The Centrex that MCI proposes to sell to unaffiliated end users is something else: a service that SBC does not offer, at retail, to its end user customers, and thus a service SBC is not obligated to provide under Section 251(c)(4). Staff provides further confirmation that MCI's proposal involves a different service than what SBC provides; Staff points out that the proposal would allow MCI "to obtain a wholesale rate to serve a group of customers that is based on a retail rate that does not exist for the services."

MCI also asserts that it should be allowed to aggregate so it can achieve operational efficiencies. But the 1996 Act does not require SBC to offer, for resale, retail services tailored to enhance MCI's business plans. SBC also has no obligation to offer retail services that promote the network efficiency of an interexchange carrier, as MCI suggests. For these reasons, we adopt SBC's proposed language.

RESALE ISSUE 8: WHICH PARTY'S PROPOSAL FOR THE RESALE OF CUSTOMER SPECIFIC ARRANGEMENTS (CSA) SHOULD APPLY?

ICA Reference: Resale § 5

The parties disagree on language in three general areas regarding the appropriate terms and conditions governing MCI's assumption of existing retail contracts: (1) what types of contracts can be assumed; (2) what discount rate applies to assumed contracts; and (3) in what

situations is MCI subject to termination liability when it assumes a contract. Staff supports SBC's proposed language, which we adopt here.

As an initial matter, we reject MCI's proposals because of MCI's failure to submit any substantive evidence supporting them. In its direct testimony, MCI simply stated that its proposed language was "straightforward" and that SBC's proposed language was "unnecessary or ambiguous." MCI provided no explanation of these conclusory assertions. It also offered no testimony on rebuttal relating to this issue. We find no reason to accept contract language that MCI has not justified.

In any event, we find that SBC's proposed language is preferable to MCI's.

Types of Contracts: SBC proposed language stating that MCI can assume retail contracts unless the contract expressly prohibits assumption or involves a grandfathered or sunsetted service (Resale § 5.1). MCI proposed language stating that it could assume contracts for resale "pursuant to Applicable Law" (Resale § 5.1.1). SBC's language is more specific and provides appropriate details, and we therefore adopt it.

Discount Rate: SBC proposed that assumed contracts receive a discount of 3.16 percent. MCI proposed that the applicable Commission-ordered wholesale discount will apply. SBC's proposal to include a specific discount rate can hardly be ambiguous, as MCI claims; SBC's proposal also cannot be unnecessary since MCI also proposed language on the discount rate question. Accordingly, the Commission follows Staff's recommendation and rejects MCI's language because it lacks necessary specifics.

In addition, we find that MCI's proposal is extremely vague. The proposed line in the Price Schedule addressing Resale is simply a reference to SBC Tariff 20, Part 22 and the appropriate commission ordered resale discount. Price Schedule line 1051. As a result, it is impossible to determine from MCI's evidence what rate (or rates) should be used.

Termination Liability: SBC proposed that MCI be subject to termination liability if it prematurely terminated an assumed contract, except when that contract is replaced by a new contract involving greater term or volume. MCI proposed, in one sentence of its proposed Section 5.1.1, that it would assume termination liability for an assumed contract but stated, in the next sentence, that assumption of a contract "will not constitute ground for collection of a termination liability." We conclude that MCI's language is not straightforward.

The Commission adopts SBC's language, which (as Staff agrees) is preferable because it is "more specific and provides appropriate details."

SS7 ISSUE 1: **UNDER WHAT CIRCUMSTANCES SHOULD SBC BE REQUIRED TO PROVIDE (SS7) SIGNALING TO MCIM AS AN UNBUNDLED NETWORK ELEMENT?**

SS7 ISSUES 2 AND 3: **IF MCIM PURCHASES SS7 LINKS AND PORTS FROM SBC ILLINOIS, WHAT SHOULD BE THE PRICE OF THOSE PORTS?**

ICA References: UNE § 17.2, SS7 Appendix (all) and Pricing Appendix, lines 755 *et seq.*

Alternative 1

The Commission finds that the no terms related to SS7 should be included in the ICA. As explained above, federal law precludes the inclusion of any terms for unbundled local switching. Since SS7 can be used as a UNE only in conjunction with ULS, the Commission agrees with SBC and Staff, rejects the SS7 Appendix in its entirety and dismisses SS7 Issues 1 through 3 as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed language for SS7. SS7, or "Signaling System 7," is the network infrastructure that transmits signaling messages within and between networks. It assists in call set-up functions and in the retrieving information from call-related databases such as LIDB and CNAM. There are three aspects to the SS7 issues, each of which is discussed below.

First, SBC proposes language in UNE Section 17.2 that makes clear that SBC obligate to provide SS7 as a UNE only when MCI uses SBC's unbundled local switching and that all other use of SBC's SS7 network will be pursuant to the terms of its Access tariffs. The Commission adopts SBC's proposal as a correct statement of the law. The *TRO* (¶ 544) establishes that SS7 is no longer a UNE, except when it is provided in conjunction with unbundled local switching:

There is no support for MCI's request that it receive access even when it is connecting to SBC's network on a switch-to-switch basis. In that situation, MCI can buy SS7 through SBC's access tariffs, just as all other carriers do. Any different result would give MCI an unwarranted advantage and would undermine the access charge regime by substituting UNE rates for access charges.

Second, MCI's proposed SS7 Appendix is fundamentally confused. It purports to apply only to the extent that SBC "is required by the Commission to provide Local Circuit Switching as an unbundled Network Element" (Section 1.1), but then proceeds to establish terms that have nothing to do with its use of SS7 with unbundled switching. For example, it contains terms for establishing "signaling link transport" and for accessing "signaling transfer points" – but those things are only needed for switch-to-switch connections. When MCI uses SBC's unbundled local switching, there is no need (and in fact no ability) for MCI to connect to SBC's SS7 network, so there will be no "signaling links" between SBC and MCI for ULS traffic. Nor will

MCI access SBC's signaling transfer points or signaling control points. All of the components of the SS7 network are internal to SBC.

Third, MCI proposes to include TELRIC-based SS7 rates in the Pricing Appendix, but the Commission finds no need for such an approach. When MCI uses SBC's unbundled switching, SBC does not impose any extra charges for the SS7 signaling it provides, so there is no need to include TELRIC-based SS7 rates in the ICA. MCI's apparent intent is to obtain TELRIC-based rates for switch-to-switch interconnection of SS7 networks. MCI attempts to justify this as "interconnection" under Section 251(c)(2), but as discussed in NIM Issue 17, and as this Commission recently held in the XO arbitration (Docket 04-0371), the interconnection obligation of Section 251(c)(2) merely permits a CLEC to interconnect with SBC; it does not obligate SBC to sell piece parts of its network at TELRIC rates in order to accomplish that interconnection. Thus, MCI's claim has no legal basis.

SBC UNE ISSUE 1: SHOULD SBC ILLINOIS BE REQUIRED TO PROVIDE DS1, DS3, OR HIGHER CAPACITY LOOPS AS AN UNBUNDLED, TELRIC-PRICED OFFERING?

ICA Reference: UNE § 9.x (replacing §§ 9.5 and 9.6)

In the *TRO*, the FCC held that there was no impairment, and thus no unbundling, for loops at capacities of "OCn" or above. *TRO* ¶ 316. MCI did not seek unbundled access to OCn loops in its Petition or its proposed contract language. MCI's proposed Section 9.1.1 defines loops as DS1, DS3 and dark fiber and thereby excludes OCn loops.

For DS1 and DS3 capacity levels (along with dark fiber, which is addressed under SBC UNE Issue 2), the FCC made a provisional finding of impairment nationwide, and attempted to enlist the states in applying the impairment analysis at a more granular level. *Id*. ¶¶ 202 (loops), 359 (transport). On appeal, the D.C. Circuit held that the FCC's approach for high-capacity loops and transport was unlawful. Accordingly, the D.C. Circuit vacated the FCC's unbundling rules for these network elements.

As explained above, there is no impairment finding to support unbundling of DS1 or DS3 loops, and the Commission agrees with SBC that the ICA should not include any language for those network elements (or for combinations, such as EELs, that include those network elements). Accordingly, the Commission holds that there should be no language in Sections 9.5 and 9.6 of the UNE Appendix, or in Section 22 (Enhanced Extended Loops). Further, the associated prices in MCI's proposed Price List are stricken: Lines 31-33 (4-Wire Digital (DS-1) Loops), Lines 34-36 (DS3 Loops), Lines 146-148 (DS1 Loop Administrative NRCs), Lines 149-153 (DS1 Loop Provisioning NRCs), Lines 154-156 (DS3 Loop Administrative NRCs), Lines 157-161 (DS3 Loop Provisioning NRCs), Lines 235-237, 248-250, 261-263, 274-276, 287-289, and 300-302 (4 Wire DSL (DS1) Subloops), Lines 320-325 (DS1 and DS3 Stand-Alone NIDs), Line 333 (4-Wire Digital (DS1) Subloop NRCs), Line 334 (DS3 Subloop NRC), and Lines 344-345 (DS1 and DS3 Cross Connects).

As demonstrated above, the Commission rejects MCI's attempt to evade the result compelled by federal law governing SBC's unbundling duties under Section 251 by resorting to

purported state law requirements (Section I, UNE Question 4) and purported Section 271 obligations (Section I, UNE Question 5). The Commission finds that the *Interim Requirements* rider that SBC has offered MCI is more than adequate to secure any rights that MCI may claim under the FCC's *Interim Order*.

SBC UNE ISSUE 2: SHOULD SBC ILLINOIS BE REQUIRED TO PROVIDE DARK FIBER AS AN UNBUNDLED, TELRIC-PRICED OFFERING?

ICA Reference: Appendix UNE § 12.x (replacing § 12 in its entirety)

The *TRO*'s unbundling rules for dark fiber loops and transport facilities took the same approach as its rules for DS1 and DS3 loops and transport, and as described above, and under SBC UNE Issues 1 (loops) and 4 (transport), the D.C. Circuit vacated the *TRO* rules. Pending issuance of the FCC's forthcoming permanent rules, the FCC stated that state commissions may safely presume that *no* unbundling will be required for the network elements addressed by the *Interim Order*. Accordingly, as is more fully set forth under SBC UNE Issues 1 and 4, the Commission agrees with SBC that the ICA should not contain language regarding unbundled dark fiber loops or transport, or combinations that include dark fiber loops or transport (*i.e.*, EELs). The Commission rejects MCI's proposal to use state law or section 271 to circumvent section 251 of the 1996 Act.

SBC UNE ISSUE 3: SHOULD SBC ILLINOIS BE REQUIRED TO PROVIDE UNBUNDLED LOCAL SWITCHING (ULS), SHARED TRANSPORT, AND ASSOCIATED CALL-RELATED DATABASES AND FUNCTIONS AS TELRIC-PRICED OFFERINGS?

ICA Reference: Appendix UNE §§ 13.x, 14.x, and 17.x (replacing §§ 13, 14, and 17 in their entirety)

Enterprise Switching. The FCC held there is "no operational or economic impairment on a national basis" for enterprise switching. *TRO* ¶ 451. The resulting FCC rule established a procedure by which a state commission could petition the FCC for a waiver of its finding of non-impairment for enterprise switching. 47 C.F.R. § 51.319(d)(3). The Commission did not petition the FCC for such a waiver. Accordingly, the FCC's rule remains in effect, and under that rule SBC Illinois "is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops." 47 C.F.R. § 51.319(d)(3).

In accordance with the *TRO*, MCI's proposed contract language does not provide for access to enterprise switching; in Section 13.4.1 of the UNE Appendix, MCI proposes language providing that SBC need not provide switching for enterprise customers unless the Commission petitions the FCC for a waiver of its rules. MCI witness Lichtenberg acknowledged MCI's agreement that SBC need not provide MCI with local switching for the purpose of serving enterprise market customers absent an FCC waiver.

In its final round of testimony, MCI attempted to reverse field, adopting testimony of Staff Witness Hoagg to the effect that SBC *should* be required to provide unbundled enterprise switching under state law. The Commission rejects MCI's assertion as untimely. Section 252(b)(4) mandates that "[t]he State commission *shall limit* its consideration of any petition . . . to the issues set forth in the petition and the response." In its Petition, MCI did not seek unbundled access to network elements (including enterprise switching) for which the *TRO* held there was no impairment and thus no unbundling. Indeed, MCI's proposed contract language did not contain any provisions for enterprise switching, and its *first* round of testimony correctly acknowledged that they are not to be unbundled. MCI is barred from injecting new issues that it waived in its Petition.

In any event, the Commission finds that MCI's untimely proposal is also wrong on the merits. The FCC has expressly rejected unbundling requirements for enterprise switching, on the grounds that CLECs are not impaired without it. As shown above, the Commission cannot impose, under the rubric of state law, the exact same "more unbundling is better" regime that Congress, the Supreme Court, and the D.C. Circuit have repudiated.

Mass Market Switching. In the *TRO*, the FCC made a provisional nationwide finding of impairment for mass market switching; delegated to the states the ultimate assessment of impairment for each individual market; and issued rules for the states to apply in making those assessments. *TRO* ¶¶ 458-63; 47 C.F.R. § 51.319(d)(2). *USTA II* held that the FCC's attempted delegation of authority to the state commissions was unlawful and vacated it. *USTA II*, 359 F.3d at 568. Further, the Court vacated as unlawful and remanded to the FCC the FCC's provisional finding of mass market switching "impairment," holding that that finding could not stand on its own. *Id.* at 570-71. The Commission accordingly holds that, as a result of *USTA II*, incumbent LECs cannot be required to provide unbundled access to "mass market" switching.

Shared Transport and Call-Related Databases. Because there can be no contract provisions for unbundled mass market switching (as a result of *USTA II* and the *Interim Order*) or "enterprise" switching (for which the *TRO* held there is no impairment) there can be no contract language for unbundled local switching. By the same token, there can be no contract provisions for network elements (such as shared transport) or functionalities (such as call-related databases) that CLECs were only entitled to access on an unbundled basis through SBC's unbundled local switching.

SBC UNE ISSUE 4: SHOULD SBC ILLINOIS BE REQUIRED TO PROVIDE DEDICATED TRANSPORT AS AN UNBUNDLED, TELRIC-PRICED OFFERING?

ICA Reference: UNE § 15.x (replacing § 15 in its entirety)

For the reasons set forth above, the Commission holds that the ICA should not contain any language regarding dedicated transport (section 15) or combinations like EELs that include dedicated transport (section 22). Accordingly, the related line items in the pricing schedule should be deleted: Lines 344-345 (DS1 and DS3 Cross Connects), Lines 359-382 (Dedicated Transport Charges (Pricing Issue 29)), Lines 720 – 775 (EEL Combinations, Pricing Issue 28), Lines 776 – 889 (EELs), and Lines 891-892 (Special Access to UNE Conversion NRCs).

SBC UNE ISSUE 5: **SHOULD SBC ILLINOIS BE REQUIRED TO PROVIDE NEW AND/OR EXISTING COMBINATIONS OF DECLASSIFIED NETWORK ELEMENTS AS TELRIC-PRICED OFFERING?**

ICA Reference: UNE §§ 21.x and 22.x (replacing § 22 in its entirety)

For the reasons set forth above, the Commission finds that the Agreement should not contain any language regarding UNE-P combinations (Section 21) or EELs (Section 22). The related line items in the pricing schedule should likewise be deleted: Lines 668-718 (UNE-P Combinations, Pricing Issue 27), Lines 720 – 775 (EEL Combinations, Pricing Issue 28), Lines 776 – 889 (EELs), and Lines 891-892 (Special Access to UNE Conversion NRCs).

UNE ISSUE 1: **WHAT ARE THE APPROPRIATE GEOGRAPHIC LIMITATIONS OF SBC ILLINOIS' OBLIGATION TO PROVIDE ACCESS TO NETWORK ELEMENTS?**

ICA Reference: UNE § 1.1

The portion of Section 1.1 at issue here consists of four words that limit SBC's undertaking to provide unbundled access to its "incumbent local exchange areas." That limitation recognizes and codifies the undisputed point that SBC is not the "incumbent local exchange carrier" everywhere, or even everywhere in Illinois. Accordingly, SBC's "additional obligations" as an "incumbent local exchange carrier" under section 251(c)(3) of the 1996 Act – including the obligation to provide unbundled access under section 251(c)(3) do not extend everywhere in the world or in Illinois. Rather, they are limited to the places where SBC is the incumbent – a term the 1996 Act defines "with respect to an area" where SBC provided telecommunications service "on the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 251(h)(1).

MCI has no substantive objection and indeed agrees that the ICA should inform the parties as to the geographic limits applicable to the UNEs and resale services at issue. Further, MCI has no concrete objection to the language proposed by SBC. Instead, MCI expresses a vague concern that the proposed language muddies the water and could in some unidentified way be read to limit SBC's obligations far beyond that required by the [1996] Act. We disagree. The terms "incumbent local exchange" and "area" are crystal clear, and they come from the 1996 Act – namely, section 251(h), which defines "incumbent local exchange carrier" by reference to the "area" in which that carrier provided service in 1996. We adopt SBC's proposal.

UNE ISSUE 2: **SHOULD THE UNE APPENDIX CONTAIN A LAWFUL UNES REQUIREMENT IN ADDITION TO CHANGE OF LAW RIGHTS?**

ICA Reference: UNE §§ 1.1, 1.1.1, 1.1.2, 6 (intro), 7.11, 7.12, 13.1.1., 22.1.1; Appendix xDSL 1.1

The issue presented here is a procedural one: What happens if a regulatory agency or court determines that CLECs are not impaired without unbundled access to a particular network element (thereby "declassifying" that network element)? We find that SBC's position is dictated by the 1996 Act and by the decisions of the Supreme Court and the D.C. Circuit: SBC would no longer have to provide unbundled access (subject to a 30-day transition period described under UNE Issue 12). MCI's position is SBC should go through "change of law" negotiations (and most likely litigation) while MCI reaps in the meantime the windfall of unbundled access (and the associated low prices) for much longer than it is entitled to such access. Staff, meanwhile, agrees with SBC to the extent that the Agreement should have language for prompt "declassification" of network elements that are the subject of the FCC's pending rulemaking (mass market switching, enterprise market loops, and dedicated transport), but supports MCI's proposal of delay for other declassifications. We reject MCI's and Staff's proposals.

As an initial matter, we note that parts of SBC's proposed contract language, namely, the portions that recite the *TRO* or the mandate in *USTA II* as a source of declassification, have been rendered moot. The D.C. Circuit has issued its mandate in *USTA II* and vacated the former unbundling rules for mass market switching, enterprise market loops, and dedicated transport. Accordingly, there is no longer any need to provide for the declassification of those network elements upon the issuance of the *USTA II* mandate; rather, we find that the ICA should not include any provisions that "classify" those network elements as UNEs in the first place.

Also moot is Staff's recommendation that the Agreement provide for the "declassification" of those network elements under the FCC's forthcoming new rules. Mass market switching, enterprise market loops, and dedicated transport have *already* been declassified by the mandate in *USTA II*. The FCC recognized as much in the *Interim Order* (at ¶ 17). That is why the FCC announced interim requirements in the first place: After all, if federal law still required unbundling of the network elements described in the *Interim Order*, there would have been no need for the FCC to adopt interim requirements. The FCC's new rules might classify mass market switching, enterprise market loops, or dedicated transport as UNEs in some markets or situations, but until then there has been no impairment finding (and no unbundling obligation outside of the interim requirements), and the FCC has instructed state commissions to proceed on the assumption that there will be *no* unbundling obligations imposed in the forthcoming rules. *Interim Order* ¶ 22.

That leaves the question as to what to do about other declassifications in the future. We find that MCI should not be allowed to mire SBC in the change-of-law process while it continues to receive unbundled access to which it is not entitled. SBC has been subject to unlawful unbundling obligations at the federal level for more than eight years. Further delay would be unfairly prejudicial to SBC and would be untenable – a point driven home by the D.C. Circuit's accelerated mandate in *USTA II*. 359 F.3d at 595 ("This deadline is appropriate in light of the

Commission's failure, after eight years, to develop lawful unbundling rules"). By contrast, we find there would be no prejudice to MCI from the prompt implementation of a declassification decision: By definition, a network element would be declassified only if CLECs were *not* impaired without unbundled access. To the extent a transition period is necessary, SBC's proposed language provides for a 30-day transition period, which is sufficient to satisfy any legitimate business needs.

Finally, MCI's proposed language for Sections 13.3 and 13.4.1 states that MCI is not entitled to unbundled enterprise switching absent an FCC waiver of its non-impairment finding (see SBC UNE Issue 3 and Issue 54), but that MCI *is* entitled to such switching if the FCC does issue a waiver, without referencing a "change of law" process. Thus, if the FCC goes in MCI's favor on enterprise switching, MCI wants prompt implementation, but if the FCC goes the other way MCI wants delay. MCI cannot have it both ways.

For these reasons, we reject MCI's proposal and adopt SBC's.

UNE ISSUE 5: SHOULD MCI BE PERMITTED TO USE SBC ILLINOIS' UNBUNDLED NETWORK ELEMENTS TO PROVIDE SERVICE TO OTHER TELECOMMUNICATIONS CARRIERS?

ICA References: UNE §§ 2.3, 3.1.2

Section 251(c)(3) of the 1996 Act limits the scope of an incumbent's duty to provide unbundled access to UNEs that are used "for the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). A "telecommunications service" is "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(51). In accordance with the Act, SBC's proposed Sections 2.3 and 3.1.2 provide that MCI may not obtain UNEs for resale to other telecommunications carriers. We adopt SBC's proposed language.

We note that SBC's position on this issue is echoed by other state commissions. In the arbitration between SBC and MCI in Ohio, the PUCO agreed that "a logical interpretation of 'such classes of users as to be effectively available directly to the public' cannot lead to the conclusion that 'such classes of users' are other telecommunications carriers." *In re Petition of MCImetro Access Transmission Services, LLC for Arbitration Pursuant to Section 252(b),* Case No. 01-1319-TP-ARB, at 72 (Nov. 7, 2002). The PUCO ruled against MCI, as we do here, because "the unbundling obligation of the Act is placed upon ILECs to allow CLECs to enter the telecommunications market as alternative retail providers, not alternative wholesale providers."

Likewise, the Texas commission correctly rejected a CLEC attempt to resell UNEs to a wireless carrier, and adopted SBC's position that end users may be residential or business customers, but not other telecommunications carriers. After examining common and technical definitions of "end user" and FCC orders, the Texas Commission determined that an end user is "the last link in the commercial chain that ultimately consumes the product or service at retail rates." *Complaint of Southwestern Bell*, at 11. The Texas Commission rejected the CLEC's argument that a wireless carrier to whom it resold UNEs purchased from an ILEC qualified as an

"end user" under the parties' interconnection agreement. *See id*. This result is consistent with the FCC's definition of an "end user" as "[a]ny customer of an interstate or foreign telecommunications service *that is not a carrier*." 47 C.F.R. § 69.2 (emphasis added). Similarly, Section 13-217 of the Illinois PUA defines "end user" as an entity that obtains telecommunications services "for its own consumption and not for resale" and its exhaustive list of end users does not include carriers.

UNE 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?**

ICA References: UNE §§ 2.1, 3.1, 3.1.2.1, 3.1.2.2, 3.6.1

UNE ISSUE 7: **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?**

ICA References: UNE § 3.1.3 *et seq.*

UNE ISSUE 8: **SHOULD SBC ILLINOIS' ADDITIONAL TERMS AND CONDITIONS FOR QUALIFYING SERVICE BE INCLUDED IN THE CONTRACT?**

ICA References: UNE §§ 3.1 *et seq.*, 3.2, 3.3, 3.4 *et seq.*, 3.5, 3.6

UNE Issues 6, 7, and 8 involve Section 3 of the UNE Appendix, which is intended to implement the *TRO*'s provisions regarding "Qualifying Services" and "Nonqualifying Services." Although MCI proposed language for Section 3, it now argues that Section 3 should be omitted on the grounds that the FCC's rules for qualifying service were vacated in *USTA II*. SBC agrees that the Section 3 material regarding Qualifying Services could be omitted in light of *USTA II*. As we discussed in connection with SBC UNE Issues 1 through 5, however, there are numerous other sections of the UNE Appendix which should also be deleted in accordance with *USTA II*, including Section 13 (Lawful UNE Local Switching); Section 15 (Lawful UNE Dedicated Transport); Section 16 (Operator Services and Directory Assistance); Section 17 (Signaling Networks and Call Related Databases); and Section 22 (Enhanced Extended Loop). We will not allow MCI to "pick and choose" only those aspects of *USTA II* with which it agrees. We rule that Section 3 of the UNE Appendix, as well as the other sections mentioned above, will be excluded from the ICA.

UNE ISSUE 9: **SHOULD THE UNE APPENDIX LIMIT SBC ILLINOIS' OBLIGATION TO PROVIDE UNES OR UNE COMBINATIONS TO ONLY THAT REQUIRED BY APPLICABLE LAW?**

ICA Reference: UNE § 3.7

We find that, by definition, SBC's proposed language for Section 3.7 "meet[s] the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." It provides that SBC has no obligation to provide UNEs "beyond those required by the Act, including the Lawful and effective FCC rules and associated FCC and judicial orders."

MCI nonetheless objects, taking the view that a Section 251 interconnection agreement should not include language tracking Section 251. MCI contends that SBC's proposal would "impermissibly restrict the Commission from ordering access to SBC's network elements under state law, or other sources of law independent of Section 251 of the [federal] Act." But those contentions simply prove that SBC's proposal *comports* with federal law. After all, the FCC held in the *TRO* that states may *not* "impose any unbundling framework they deem proper under state law, *without regard to the federal regime*." *TRO* ¶ 192 (emphasis added). The FCC went so far as to say that it would be "unlikely" that any "decision pursuant to state law" that "require[d] the unbundling of a network element for which the Commission has . . . found no impairment" ever could be consistent with federal law. *Id*. And in its briefs before the D.C. Circuit, the FCC repudiated MCI's position and warned that "[i]n the UNE context . . . a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element," and "[a]ny state rule that struck a different balance would conflict with federal law, thereby warranting preemption." SBC Br. on Impact of Interim Order, Ex. 1.

On appeal, the D.C. Circuit left intact the FCC's direction that all state commissions "amend their rules and . . . alter their decisions to conform to" the FCC's national unbundling rules. *TRO* ¶ 195. It is thus not surprising that the Seventh Circuit has concluded that it "cannot now imagine" a state-imposed unbundling requirement that would comport with the federal Act. *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004).

MCI's reference to "other sources of law independent of Section 251" is apparently a reference to Section 271 of the 1996 Act. As we explained above, however, Section 271 does not give states authority to order access to SBC's network elements. In fact, it does not give states any rulemaking authority at all, and the Seventh Circuit has expressly held that states cannot use their advisory role under Section 271 to promulgate rules. Furthermore, even if State commissions could promulgate rules under Section 271, Section 271 issues still would not be subject to arbitration under Section 252.

MCI also contends that the proposed language would permit SBC "unilaterally to suspend access to UNEs." That is not correct. The proposed language unambiguously states that SBC will provide (or suspend) access to UNEs *in accordance with FCC rules and orders*, and to the extent the parties disagree over the interpretation of those rules they will address those disputes just like any other disputes over the law – before the Commission, the FCC, or the

courts – as they arise. MCI's real proposal is that the parties should instead rely on change-of-law negotiations to implement FCC directives, and we rejected that proposal for the reasons set forth under UNE Issue No. 2.

UNE ISSUE 10: SHOULD MCIM BE REQUIRED TO PURCHASE COLLOCATION FOR ACCESS TO UNBUNDLED LOOPS?

ICA Reference: UNE § 4.2.4

Section 4.2.4 of the UNE Appendix states that MCI may elect (but is not required) to access SBC's lawful UNEs through physical collocation arrangements. The issue here involves MCI's proposal to add the following disputed language at the end of Section 4.2.4: "MCIm may also access unbundled loops without purchasing collocation from SBC Illinois or access via a third party when MCIm purchases contiguous unbundled network elements or service from SBC Illinois, regardless of whether the unbundled network elements are already assembled or MCIm combines the elements."

MCI asserts that this language is necessary to prevent SBC from requiring MCI to purchase physical collocation in order to obtain access to an unbundled loop. We disagree. The language is not necessary because other sections of the UNE Appendix make available to MCI clearly defined alternative non-collocation methods of access to UNEs. UNE Appendix §§ 4.1.1.1, 4.1.1.2.1, 4.1.1.3.1, 4.2.2.

We find that MCI's proposed language is not only unnecessary, but also unduly vague and overly broad insofar as it could be construed to provide MCI with methods and points of access to which it is not legally entitled. For example, the language could be interpreted to give MCI authority to combine elements within SBC's network, *e.g.*, at the MDF. MCI, however, has no such authority. *Illinois 271 Order,* Docket 01-0662 at 77-78 (May 13, 2003) (finding that ILECs are "not required . . . to provide access to the MDF"). Finally, we find that the reference to "service" makes the language ambiguous and contradictory to its stated rationale.

UNE ISSUE 11: SHOULD THE UNE APPENDIX DESCRIBE DECLASSIFIED ELEMENTS?

ICA References: UNE §§ 1.1, 5, 9.11, 12.13, 15.5

See the resolution of UNE Issue No. 2.

UNE ISSUE 12: SHOULD THE UNE APPENDIX CONTAIN DETAILS CONCERNING THE TRANSITIONAL PLAN FOR DECLASSIFIED ELEMENTS?

ICA References: UNE §§ 1.1, 5, 9.11, 12.13, 15.5

As we held under UNE Issue No. 2, in the event that a network element is "declassified," SBC is not be required to provide it. This issue concerns the appropriate transition plan. SBC proposes that it give 30 days' advance written notice. MCI would then have time to decide whether to continue receiving access (but at the rates established under SBC's access tariff rather

than at UNE rates) or to discontinue access (*e.g.* to serve the customer using its own facilities or those of a competing provider). If no agreement is reached by the end of 30 days, MCI's UNE would automatically be converted to an analogous access service if one exists. MCI does not contest the 30-day period in this context, and Staff agrees that 30 days is sufficient to implement a price change. Staff, however, advocates that the UNE be repriced as a "section 13-801 UNE" rather than as an access service. We adopt SBC's proposal.

If there is no analogous SBC access service, and the parties do not reach agreement within the 30-day notice period, SBC might disconnect the UNE. MCI portrays this result as harsh or "drastic," without providing any concrete examples in which this situation would apply at all. But MCI is forgetting the context in which the declassification provisions would take effect. By definition, declassification occurs when an agency or court with jurisdiction finds there is no impairment without unbundled access (or that CLECs should not receive unbundled access despite the presence of some impairment, because of countervailing issues like the need to promote investment). All SBC's proposed language does is implement a decision that has already been made by the agency or court. Given that MCI is not impaired without unbundled access – meaning that it has alternatives from itself or other providers – the termination of unbundled access would not be "harsh" or "drastic" at all, and 30 days' notice is more than sufficient.

UNE ISSUE 13: WHEN CONVERTING WHOLESALE SERVICES TO UNES, WHAT SHOULD THE CONTRACT SPECIFY REGARDING ELIGIBILITY REQUIREMENTS AND QUALIFYING SERVICE REQUIREMENTS?

ICA References: UNE §§ 6.1, 6.6

MCI objects to language proposed by SBC for Section 6.1 which provides that SBC's obligation to convert a wholesale service or group of wholesale services to the equivalent lawful unbundled network elements or combination of lawful unbundled network elements applies only "so long as MCIm and the wholesale service, or group of wholesale services, meets the eligibility or other criteria that may be applicable for such conversion." MCI's proposed language for Section 6.1 would simply state that SBC is required to convert wholesale services to any UNEs requested by MCI without any reference to the eligibility criteria applicable to such a request or to the underlying UNEs sought. MCI, however, does not have an unlimited right to convert wholesale service to UNEs. Accordingly, we find that reference to eligibility criteria is necessary to provide clarity and avoid potential disputes. Staff agrees that MCI's proposal to remove the reference to eligibility criteria from Section 6.1 should be rejected, stating that "eligibility criteria for Section 251 UNEs and UNE combinations are applicable whether those UNEs are the product of a conversion or the product of SBC work to combine previously unconnected UNEs." Staff proposes to delete the last sentence of 6.1, which refers, by way of example, to the "qualifying service requirement." SBC does not object to that modification in light of *USTA II*. Accordingly, the Commission rejects MCI's position and adopts SBC's proposed language for Sections 6.1 and 6.6, subject to Staff's proposed modification.

UNE ISSUE 14: WHAT PROCESS SHOULD APPLY TO THE CONVERSION OF WHOLESALE SERVICES TO UNES?

ICA Reference: UNE § 6.2

In Section 6.2, SBC proposes that requests for conversions of wholesale services to UNEs follow the currently existing and applicable guidelines and ordering requirements that have been developed by SBC with the collaboration of the CLEC community (including MCI) through the change management process ("CMP"). MCI, on the other hand, proposes to implement a unique process applicable only to MCI. We reject MCI's proposal and adopt SBC's. Uniform procedures promote efficiencies for all carriers as well as for SBC. Accordingly, where processes are already in place that apply to all CLECs, MCI should follow those processes. Moreover, as Dr. Zolnierek correctly observed in supporting SBC's position, MCI did not present any evidence to suggest that SBC's current provision of conversions using its existing processes are deficient or have resulted in poor provisioning to MCI; nor did MCI offer any evidence that it is feasible for SBC to meet MCI's proposed provisioning intervals, particularly with respect to first time or unusual requests for conversions for which SBC does not currently have processes.

As reflected in SBC's proposed Section 6.2, SBC has committed to developing additional processes, where they are not already in place, on an industry wide basis via the CMP, so that uniform processes can be implemented for all CLECs interested in the same types of conversions. The CMP was developed after many months of negotiations with CLECs throughout SBC's service territory and has been approved by numerous state commissions, including this Commission in the 271 proceeding. See *Order on Investigation*, Docket No. 01-0662 at 252 (May 13, 2003). SBC's Change Management process was also expressly approved by the FCC. *Joint Application of SBC Communications, Illinois Bell Telephone Company, et al.*, WC Docket No. 03-167, *Memorandum Opinion and Order*, FCC 03-243, ¶¶ 134-40 (Rel. Oct. 15, 2003).

MCI suggests that its proposed conversion process and timeline are mandated by the *TRO*. We disagree. To the contrary, the FCC expressly "decline[d] suggestions of several parties to adopt rules establishing specific procedures and processes that competitive LECs follow to convert wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations . . ." *TRO* ¶ 585. The FCC also expressly declined to establish any specific timeframes for conversions stating that those are "better established through negotiations between incumbent CLECs and the requesting carriers." *Id*. ¶ 588.

For these reasons, MCI's proposal is rejected and SBC's adopted.

UNE ISSUE 16: MUST CONVERSION BE SOLELY COMPRISED OF UNES OR AS OTHERWISE PROVIDED IN THIS APPENDIX?

ICA Reference: UNE § 6.5

SBC's proposed Section 6.5 states that the terms and conditions of Section 6 ("Conversion of Wholesale Services to UNEs") apply only to situations in which a wholesale service or group of services is being converted solely to UNEs. We find that this proposal

comports with the *TRO* and FCC rules and provides clarity to the ICA. *TRO* ¶ 586 ("we conclude that carriers may . . . convert wholesale services to *UNEs* and *UNE* combinations, so long as the competitive LEC meets the eligibility criteria." 47 C.F.R. § 51.316 (providing for the conversion of wholesale services "to the equivalent *unbundled network element* or combination of *unbundled network elements*, that is available to the requesting telecommunications carrier under Section 251(c)(3) of this Act and this part"). Contrary to MCI witness Price's assertion, Section 6.2 does not prohibit a conversion where only one part of a current wholesale offering can be converted to a UNE. Thus, if MCI has special access service that includes service over both a loop and transport component, and only the loop component is a lawful UNE, MCI could request that the loop portion be converted to a UNE and the UNE loop be commingled with special access transport in accordance with the provisions of the ICA governing commingling (including those implementing FCC Rule 51.318(b)). In sum, SBC's proposed Section 6.5 is consistent with controlling law and is adopted.

UNE ISSUE 17: SHOULD THE OBLIGATION TO COMMINGLE BE RESTRICTED TO THE EXTENT REQUIRED BY THE FCC'S RULES AND ORDER?

ICA Reference: UNE § 7.1

SBC's proposed Section 7.1 provides that commingling of a Lawful UNE or a combination of Lawful UNEs with wholesale services obtained from SBC is permitted "to the extent required by FCC rules and orders." We find that this language is appropriate because it makes clear that SBC has no obligation to provide commingling beyond that required by federal law, and that the rates, terms and conditions for commingling are governed by the *TRO*. Staff witness Zolnierek supports SBC's proposed language, stating that it "simply reflects the current state of the rules and regulations." MCI's only stated concern with SBC's proposed language was that it allegedly grants SBC "unilateral change of law rights." We disagree and, as Dr. Zolnierek recognized, "a plain reading of SBC's proposed language suggests no such thing." Accordingly, SBC's proposed language for Section 7.1 is approved.

UNE ISSUE 18: SHOULD THE DEFINITION OF COMMINGLING INCLUDE WHOLESALE SERVICES PURCHASED "PURSUANT TO ANY METHOD OTHER THAN UNBUNDLING UNDER SECTION 251(C)(3)"?

ICA Reference: UNE § 7.2.1

This issue involves the appropriate definition of "commingling" as set forth in Section 7.2.1 of the Appendix. MCI's proposed language, with the portion opposed by SBC highlighted, is:

> "Commingling" means the connecting, attaching or otherwise linking of a lawful UNE, or a combination of lawful UNEs, to one or more facilities or services that MCIm has obtained at wholesale from SBC Illinois ***pursuant to any method other than unbundling under Section 251(c)(3) of the Act***, or the combining of a Lawful UNE, or a combination of Lawful UNEs, with

one or more facilities or services. "Commingling" means the act of commingling.

Read literally, MCI's proposal would appear to allow the commingling of UNEs with network elements that SBC provides pursuant to its Section 271 obligations, which are not Lawful UNEs for which unbundling is required under Section 251(c)(3) of the 1996 Act. As we explained in more detail in connection with our resolution of UNE Issue 23, SBC has no obligation to commingle Section 271 network elements with Section 251 UNEs. Accordingly, MCI's proposed language is rejected.

UNE ISSUE 19: UNDER WHAT CIRCUMSTANCES IS SBC OBLIGATED TO PERFORM THE FUNCTIONS NECESSARY TO CARRY OUT COMMINGLING?

ICA References: UNE §§ 7.3.1, 7.3.1.1, 7.3.1.2

Section 7.3.1 governs SBC's obligation to perform, on MCI's behalf, the functions necessary to commingle a UNE or combination of UNEs with one or more facilities or services obtained by MCI at wholesale from SBC. MCI's version of Section 7.3.1 would impose that obligation on SBC without any limitation. SBC's proposed language, on the other hand, provides that it should have no obligation to perform functions to commingle (or to complete the actual commingling) where (i) MCIm is able to perform those functions itself; (ii) it is not technically feasible, including that network liability and security would be impaired; (iii) SBC's ability to retain responsibility for the management, control and performance of its network would be impaired; (iv) SBC 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's network. (In response to the testimony of Staff witness Zolnierek, SBC agreed to drop a sixth condition related to situations in which a "CLEC is a new entrant," a situation not applicable to this agreement). As we discussed in more detail in connection with our resolution of UNE Issues 71 and 72 (which deal with UNE combinations), the above limitations are the same as the limitations recognized by the United States Supreme Court in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (May 13, 2002), as applying to an ILEC's obligation to combine UNEs pursuant to FCC Rule 51.315(c) and (d). 47 C.F.R. § 51.315(c), (d). We find that the application of these same limitations to SBC's commingling obligations is appropriate because the FCC used essentially the same language in imposing the "commingling" obligation on ILECs as it used in imposing the UNE combining obligation – "performing the functions necessary to." *Compare* 47 C.F.R. § 51.309(f) on commingling with § 51.315(c) and (d) on combinations. Thus, instead of indicating that the commingling obligation was a broader one with fewer limitations, the FCC's choice of language indicates that the ILEC commingling obligation was to be no greater than the identically worded UNE combining obligation.

Staff witness Zolnierek recommends that the Commission adopt conditions (ii), (iii) and (v), listed above, as being reasonable on their face and consistent with the FCC's rules and regulations. He also recommended that the Commission require the inclusion of language assigning the burden of proof to SBC regarding such circumstances. MCI accepted Staff's recommendations.

Dr. Zolnierek, however, also recommended that "absent further clarification" the Commission reject SBC's proposed condition (i), which provides that SBC has no obligation to perform functions necessary to commingle (or to complete the actual commingling), where MCI is able to perform those functions itself. As discussed by SBC witness Albright, the clarification sought by Dr. Zolnierek was provided in response to a Staff data request (attached to Mr. Albright's rebuttal testimony as Schedule CCA-R1), which identifies the steps SBC would take to enable MCI to complete the commingling for itself in a collocation setting. The same process described in Schedule CCA-R1 would also apply in the case of combining UNEs. Contrary to the concern expressed by Dr. Zolnierek, SBC's position does not require MCI to complete a commingling arrangement in situations where it is physically unable to do so. Rather, it is SBC's position that MCI should be deemed to be able to commingle UNEs and access services for itself in central offices where MCI is collocated and orders both an access circuit and a UNE circuit to terminate to the same collocation facility. In that situation, an MCI technician is able to physically connect the access in UNEs circuits together as well as to determine whether any multiplexing or testing is being required. Accordingly, we find that the concerns expressed by Dr. Zolnierek with respect to condition (i) have been addressed and that condition shall also be included in Section 7.3.1.

UNE ISSUE 20: IS THE BFR THE APPROPRIATE VEHICLE FOR SUBMITTING CERTAIN COMMINGLING REQUESTS?

ICA Reference: UNE § 7.3.2. *et seq.*

SBC proposes that any request made by MCI for SBC to perform the functions necessary to commingle, as well requests that SBC complete the actual commingling, be made by MCI in accordance with either the example order exhibits in SBC's online CLEC handbook or with the bonafide request ("BFR") process set forth in the ICA. Proposed Section 7.3.2 also identifies critical information that MCI must provide with its BFR (Subsection 7.3.2.1) and allows SBC to charge MCI a reasonable fee, in addition to other applicable charges, for commingling work required by Section 7.1. MCI proposed no competing language for Section 7.3, and takes the position that a BFR should never be required for commingling requests. SBC's BFR process is the time-tested, Commission-approved way for SBC to respond to specialized requests from CLECs. This process has been in place since 1996, and the Commission has consistently upheld it as reasonable.[5] MCI identified no valid reason why the BFR process is not also an appropriate ordering process for undefined and unidentified commingling arrangements. We therefore adopt SBC's proposal.

In opposing SBC's proposal, MCI and Staff both assumed that the BFR process would be used for all commingling requests. That is not the case. In fact, the BFR process would apply only when MCI requests a commingled arrangement that is not currently available (either for

[5] *Nov. 26, 1996 Arbitration Decision*, Docket Nos. 96-AB-003/96-AB-004, at 50 (upholding 30-day period for SBC Illinois to respond to a BFR with a preliminary analysis); *Dec. 17, 1996 Arbitration Decision*, Docket No. 96-AB-006, at 30 (upholding 120-day maximum interval for final response to BFR); *Aug. 8, 2001 Arbitration Decision*, Docket No. 01-0338 at 23 (finding that BFR process was appropriate); *March 21, 2001 Arbitration Decision*, Docket No. 00-0769, at 15-16 (same); *June 11, 2002 Order*, Docket No. 01-0614 at 150 (SBC Illinois' modified BFR process approved to process requests for new combinations).

ordering or provisioning). SBC is in the process of developing a list of standard commingled arrangements that will be made available in the CLEC handbook and posted on SBC's CLEC online website. Once that is done, CLECs will be able to submit orders for any Commingled Arrangements on the list without the need to issue a BFR. An initial list will likely be completed before the ICA at issue in this case becomes effective. Accordingly, the assumptions of MCI and Staff that, in the future, all commingling requests will be subject to a BFR process are incorrect.

We note, however, that it is impossible for SBC to anticipate every type of commingling arrangement that MCI, or any other CLEC, may actually want. Thus, we find that any CLEC request for a commingled arrangement not found on the "standard" list must be submitted to SBC via a BFR. This is necessary because the requested types of UNEs, facilities, and/or services to be commingled may or may not have the same ordering/provisioning/billing requirements and functionalities. As a result, the systems may not be able to "speak" to each other on an immediate basis and, therefore, need to be enhanced or changed. For example, the CFA (circuit facilities assignment) may need to be physically changed; retagging of the circuits may need to be physically completed; SBC internal systems (TIRKS, WAFA, etc.) may need to be updated and associated orders issued; internal methods and procedures updated and trained on to ensure operational knowledge and effectiveness; sufficient testing performed to ensure that everything works as planned; and, finally, in some cases, collocation may need to be added (to comply with the FCC's mandatory eligibility criteria). 47 C.F.R. § 51.318(b). These system changes and edits cannot happen overnight, particularly where system programming work is needed, and cannot be completely anticipated at this time since the full scope of the types of commingling arrangements that may be requested by CLECs is unknown.

The Commission rejects Staff's recommendation that, in lieu of the BFR process, SBC be ordered to develop and provide MCI with rates, terms and conditions for the conditioning of a commingling request within 30 days of the request. For the reasons discussed above, we find that 30 days is not adequate to review, determine availability and provide agreed-upon terms for those commingling requests that would be the subject of a BFR.

UNE ISSUE 21: WHICH PARTIES' "RATCHETING" PROPOSAL SHOULD BE INCLUDED IN THIS AGREEMENT?

ICA Reference: UNE § 7.5.1

"Ratcheting" is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate. *TRO* at fn. 1785. SBC's definition of "ratcheting," as set forth in Section 7.5.1 of the UNE Appendix, explains how all portions of the circuit, whether access or UNE, would be billed. MCI's definition, on the other hand, includes only a definition and explanation of how the UNE portion of the commingled circuit would be billed. Dr. Zolnierek supported the adoption of SBC's proposed language. We agree. Dr. Zolnierek also recommended adoption of language proposed by MCI for Section 7.5.1 intended to prohibit SBC from denying MCI access to UNEs on the grounds that those UNEs share part of SBC's network with access or other non-UNEs. SBC does not object to Dr. Zolnierek's recommendation in this regard. Accordingly, the Commission approves the following language for Section 7.5.1 (presented in Ms. Fuentes' rebuttal testimony), which is consistent with Dr. Zolnierek's recommendations:

7.3 Ratching

"Ratchet" or "Ratcheting" is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate. When MCIm purchases Commingled unbundled Network Elements and wholesale services from SBC ILLINOIS, SBC ILLINOIS shall charge the rates for Lawful UNEs (or Lawful UNE combinations) Commingled with facilities or services obtained at wholesale (including for example special access services) on an element-by-element basis and such facilities and services on a facility-by-facility, service-by-service basis. Notwithstanding its obligations to Commingle under this Section, SBC ILLINOIS is not required to and shall not "ratchet" individual facilities or unbundled Network Elements; provided, however, that the lack of a ratcheting requirement does not permit SBC ILLINOIS to deny or refuse MCIm access to an unbundled Network Element or a Combination of unbundled Network Elements on the grounds that such unbundled Network Element(s) share part of SBC ILLINOIS's network with access or other non-unbundled Network Element services.

UNE ISSUE 22: WHICH PARTY'S PROPOSAL ABOUT TARIFF RESTRICTIONS SHOULD BE INCLUDED IN THE AGREEMENT?

ICA Reference: UNE § 7.6.1

MCI's proposed Section 7.6.1 would prohibit SBC from making changes to its wholesale or access tariffs in any way that impacts the availability or provision of commingling, unless SBC and MCI have amended the ICA in advance to address SBC's proposed tariff changes. We reject MCI's proposal, because tariffed wholesale access services are governed by tariffs and not by interconnection agreements. Those tariffs are governed by separate jurisdictions, regulatory commissions, bodies of law (interstate and intrastate), and tariff changes (including processes) are subject to and governed by a separate set of processes and procedures (including regulatory orders mandating tariff changes by certain dates). The FCC does not obligate ILECs to include prices for separately tariffed services in an interconnection agreement, or to "freeze" tariffed rates, terms and conditions. Furthermore, SBC cannot refuse to make changes to its tariffs when required by law to do so (*e.g.*, by FCC or Commission order), on the grounds that it would violate an interconnection agreement. Correspondingly, SBC cannot be put in a position where its tariff changes result in a breach of an interconnection agreement. Dr. Zolnierek agreed with SBC's position, correctly noting the Commission's lack of authority "to impose a condition on the application of SBC's tariffs, in particular its federal access tariffs, through its Section 252 arbitration authority." Dr. Zolnierek also recommended the removal of certain language proposed by SBC for Section 7.6.1. SBC does not object to this recommendation. As a result, Section 7.6.1 will be shown in the ICA as being "intentionally omitted."

UNE ISSUE 23: IS SBC OBLIGATED TO ALLOW COMMINGLING OF SECTION 271 CHECKLIST ITEMS?

ICA References: UNE §§ 7.7, 7.10

In Section 7.7, MCI proposes language permitting the commingling of UNEs with "network elements provided pursuant to Section 271(c)" of the 1996 Act, while SBC proposes

language providing the contrary. We find that SBC's proposal follows the *TRO*, while MCI's proposal violates the *TRO*. The FCC made crystal clear in the *TRO* that commingling *excludes* network elements provided pursuant to section 271. In paragraph 584 of the *TRO*, the FCC originally, and erroneously, stated that "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." However, the FCC quickly realized its error, and in the *Errata* to the *TRO*, it deleted the phrase "any network elements unbundled pursuant to section 271" from paragraph 584. In the Commission's recent *XO Arbitration Decision*, we adopted SBC's position on this issue, concluding that "SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271." *Arbitration Decision*, Docket 04-0371 at 18.

Contrary to Dr. Zolnierek's assertion, the fact that the *Errata* also deleted a sentence from footnote 1990 of the *TRO* that declined to apply the commingling rules to Section 271 items does not mean that there is any ambiguity on this issue. The sentence in footnote 1990 was deleted because it was unnecessary in light of the change made to paragraph 584. The *TRO*, as amended by the *Errata*, makes clear throughout its discussion of commingling that the "wholesale services" with which UNEs may be commingled are "switched and special access services offered pursuant to tariff," as well as section 251(c)(4) resale services. *TRO* at ¶¶ 579, 584. Indeed, the amended *TRO* refers to tariffed access services repeatedly throughout its discussion of commingling, but not once to section 271 network elements. *Id.* at ¶¶ 579-84. Accordingly, the *TRO* unambiguously does *not* require SBC to permit the commingling of Section 271 items with Section 251 UNEs. Moreover, as Dr. Zolnierek recognizes, SBC has no independent state law commingling obligations. Consistent with our decision in the XO arbitration, therefore, we adopt SBC's position on this issue.

UNE ISSUE 24: WHAT PROCESSES SHOULD APPLY TO THE COMMINGLING REQUESTS?

ICA Reference: UNE § 7.8

SBC's proposed Section 7.8 states that where processes for commingling are not already in place when a commingling request is made (once a BFR has been submitted), SBC will "develop and implement processes, subject to any negotiated rate, terms and conditions" and that the "parties will comply with any applicable Change Management guidelines." Once the process is completed, a BFR will no longer be required. MCI's proposed language, on the other hand, provides that the parties will "jointly develop and implement processes," and requires that until such processes are developed and implemented, SBC must accept MCI's commingling orders "via an electronic spreadsheet and provision all such orders within 14 days of receipt."

We reject MCI's proposal, because it would require SBC to immediately, upon request from MCI, fill a commingling order before SBC has had an opportunity to develop and implement an appropriate process for handling such requests. As discussed in connection with our resolution of UNE Issue 20, SBC cannot possibly anticipate every type of commingling arrangement that might be requested. Accordingly, SBC's commits to develop processes where they are not already in place, and to do so on an industry wide basis through the change

management process ("CMP"), in order to ensure that uniform processes are implemented for all CLECs. The CMP is a 13-state collaborative process through which CLECs and/SBC identify, submit, discuss and resolve all process related issues, including commingling. The CMP ensures that all potentially affected carriers have a voice in the changing processes and that the established processes are consistent on a 13-state basis. MCI's proposal to impose an MCI-specific process developed outside of the CMP is rejected. SBC cannot be required to commit to accepting yet to be developed commingling requests via an unknown spreadsheet that is specific to MCI, nor can SBC be required to commit to an order completion period of 14 days after receipt.

Finally, we find that MCI's proposed language is also defective because it omits any reference to compensation for the development of processes for commingling requests. As SBC's language indicates, there may be applicable rates, terms and conditions associated with such requests. SBC is entitled to compensation for the work and resources that it puts into a process, as well as the work it performs when doing the commingling.

UNE ISSUE 25: WHAT SHOULD THE SCOPE OF COMMINGLING OBLIGATIONS BE?

ICA Reference: UNE § 7.9

MCI proposes language for Section 7.9 that would permit MCI to commingle UNEs or combinations of UNEs with services provided not only by SBC but also by third parties or by MCI itself. MCI's proposed language is rejected because the *TRO* expressly limits commingling to services provided by the incumbent LEC. *TRO* at ¶ 579. Staff witness Zolnierek agrees with our conclusion to reject MCI's proposal.

UNE ISSUE 27: WHICH PARTIES' DEFINITION OF A "LOOP" SHOULD BE INCLUDED IN THE AGREEMENT?

ICA References: UNE §§ 9.1.1, 9.1.4

SBC's proposed definition of a "lawful UNE local loop," set forth in Section 9.1.1, is adopted because it precisely tracks the definition of a loop in FCC Rule 51.319(a). By comparison, MCI's proposed version of Section 9.1.1 does not track the FCC rule, and inappropriately includes references to DS1, DS3, and dark fiber loops. Such loop types are defined elsewhere in the FCC's rules, with several important and unique caveats, and, therefore, the ICA contains separate definitions for those products: Sections 9.1.4 (DS3), 9.1.9 (DS3), and 12.2.2 (dark fiber). Furthermore, the FCC's unbundling rules for DS1, DS3 and dark fiber loops were vacated by *USTA II* and are the subject of the FCC's *August 20, 2004 Interim Order*. Accordingly, for the reasons discussed above, we find that this ICA should not include any terms and conditions providing for unbundled access to DS1, DS3 and dark fiber loops.

In addition, we reject MCI's proposed definition of a DS1 loop, as set forth in Section 9.1.4, because it improperly expands the definition of a DS1 loop to include xDSL services. Such services are governed by the xDSL Appendix of the ICA and not by the UNE Appendix.

UNE ISSUE 28: SHOULD SBC BE REQUIRED TO BUILD FACILITIES WHERE THEY DO NOT EXIST?

ICA References: UNE §§ 9.2, 15.2, 20.1.19

MCI's proposed Section 20.1.19 states that where facilities are not available, "SBC Illinois will make modifications and *engage in construction* to provide unbundled network elements" (emphasis added). MCI's proposal is rejected because it is directly contrary to the FCC's rules, which provide that incumbent LECs have no obligation to "construct new wire" or "construct transmission facilities so that requesting carriers can access them at UNE cost based rates." *TRO* at ¶¶ 632-648. The FCC has clearly and carefully limited the obligation to perform "routine" network modifications to situations where the requested facility "has already been constructed." *TRO* at ¶ 632; 47 C.F.R. §§ 51.319(a)(8)(i), 51.319(e)(5)(i).

In contrast to MCI's proposal, SBC's proposed Section 20.1.19 appropriately provides: "Where equipment and facilities are not available, SBC Illinois shall not be required to provide lawful UNEs. However, MCIm may request and, to the extent required by law, SBC may agree to provide lawful UNEs through the bona fide request process outlined in Appendix BFR." SBC has proposed similar language for Sections 9.2. and 15.2, which makes clear that SBC is required to provide MCI with requested UNE facilities only where such facilities are "available" and "exist at the time of MCIm's request." SBC's language is consistent with both the FCC rules discussed above and with the Commission's conclusion in Docket 02-0239, that the word "available" within the meaning of its previous decisions and the AT&T arbitrated agreement, "does not require SBC to construct network elements for the sole purpose of unbundling those elements for CLECs." *In re AT&T Communications of Illinois, TCG Illinois and TCG Chicago*, Arbitration Decision, Ill. C.C. Docket 02-0239 at 54 (August 26, 2003).

For these reasons, we reject MCI's proposal and adopt SBC's.

UNE ISSUE 30: WHAT REQUIREMENTS SHOULD APPLY WHEN SBC PROPOSES RETIRING COPPER LOOPS?

ICA References: UNE §§ 9.2.1, 10.15

In the *TRO*, the FCC declined to impose a blanket prohibition on the ability of ILECs to retire copper loops or subloops that have been replaced with fiber-to-the-home ("FTTH") loops, but did find that ILECs must provide notification of any such retirement under the FCC's network modification rules, as amended. *TRO* at ¶¶ 281-283; 47 C.F.R. § 51.333(b)(ii). Under those rules, as modified, an ILEC must file with the FCC its disclosures (notice) for copper loop and subloop requirements at least 91 days prior to their planned retirement. Parties may then file objections within nine business days from the release of the FCC's public notice. Unless the copper retirements suggest access will be denied to the loop facilities as required under the FCC's rules, all oppositions will be denied unless the FCC rules within 90 days of its public notice as to the intended retirement.

In Sections 9.2.1 (loops) and 10.15 (subloops) of the UNE Appendix, SBC agrees to comply with the network disclosure requirements set forth in FCC Rules 325 through 335 before retiring any Lawful UNE copper loop that has been replaced with an FTTH loop. Accordingly,

we find that SBC's proposal fully complies with the *TRO*. MCI, on the other hand, proposes to include additional language in Sections 9.2.1 and 10.15 that would require the creation of an advanced notice process specific to MCI alone. We find that MCI's proposal is inconsistent with the *TRO*, and would result in a network disclosure process that is preferential to MCI as compared to other carriers, and would force SBC to create an additional layer of network disclosure distribution that even MCI fails to define.

MCI's proposed language is also rejected because it would require that upon the retirement of a copper loop that had been replaced with a FTTH loop, SBC "perform, upon MCI's request, a line station transfer ("LST") where an alternative loop is available." MCI §§ 9.2.1; 10.15. We find this language confusing and it was not explained by any witness for MCI. Consistent with the *TRO*, the agreed language for Section 9.4.2.3 provides that if SBC retires the UNE copper loop pursuant to the requirement of Section 9.2.1, SBC will provide MCI, upon its request, with nondiscriminatory access to a 64 kilobyte per second transmission path capable of voice grade service over the FTTH loop on an unbundled basis. SBC has no other unbundling obligation with respect to FTTH loop in that circumstance. *TRO* at ¶¶ 273, 277. Accordingly, we find that MCI's proposed language regarding "line station transfers" for "alternative loops" in Sections 9.2.1 and 10.15 is unnecessary and is inappropriate to the extent that it may be interpreted to provide MCI with rights in a copper loop retirement scenario to which it is not entitled under the *TRO* and the agreed provisions of the UNE Appendix. MCI's proposed language is therefore rejected.

UNE ISSUE 31: SHOULD ANY LANGUAGE OBLIGATING SBC ILLINOIS TO UNBUNDLE BROADBAND SERVICES BE INCLUDED IN THE AGREEMENT?

ICA Reference: UNE § 9.3.1

The *TRO* holds that the broadband capabilities of hybrid loops are not subject to unbundling. *TRO* ¶ 288. However, where a CLEC seeks to provide broadband services using a hybrid loop, an ILEC must provide unbundled access to a complete loop transmission path that includes time division multiplexing capabilities, and includes all the "features, functions, and capabilities of hybrid loops that are *not* used to transmit packetized information." *Id.* ¶ 289 (emphasis added). *See also* 47 C.F.R. § 51.319(a)(2)(ii). MCI and SBC have agreed upon some language to implement this requirement, but disagree concerning SBC's proposal to add language stating that "SBC will not provide broadband services on an unbundled basis." Appendix UNE, SBC § 9.3.1.

We find that SBC's language is consistent with the *TRO* and merely clarifies that by providing access to the non-packetized capabilities of hybrid loops SBC is not unbundling broadband services. SBC and MCI, however, both indicated in their initial briefs that they are willing to accept compromise language proposed by Staff. Accordingly, this issue appears to be resolved.

UNE ISSUE 32: **SHOULD THE DEFINITION OF "SPARE HOME RUN COPPER" INCLUDE LOOPS THAT ARE NOT TERMINATED?**

ICA Reference: UNE § 9.3.2.2

MCI's proposed Section 9.3.2.2 would require SBC to provide MCI with access to spare home run UNE copper loops even when such loops are not "terminated." We find MCI's proposal inappropriate because, by definition, a loop is defined as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end user customer premises." 47 C.F.R. § 51.319(a). Accordingly, if a copper loop does not terminate on the distribution frame in SBC's central office and extend to the loop demarcation point at the end user customer's premises, it is not, by definition, a "copper loop." MCI asserts that SBC should have an obligation to terminate existing cables to a customer premises as a "routine network modification." We disagree. Terminating cables at a customer premises would generally require SBC to install a new terminal and/or place new cable – activities that were excluded by the FCC from the list of activities considered to be "routine network modifications." *TRO* at ¶ 636 (stating that incumbent LECs are not "required to trench or place new cables for a requesting carrier"); *id.* at ¶ 637 (stating that routine network modifications do not include "installing altogether new terminals"). Accordingly, MCI's proposal is rejected.

UNE ISSUE 33: **WHICH PARTY'S PROPOSAL FOR CAPS ON DS3 LOOPS BETTER IMPLEMENTS THE REQUIREMENTS OF THE *TRO*?**

ICA Reference: UNE § 9.6.1

Alternative 1

For DS3 loops, the *TRO* "limit[ed] an incumbent LEC's unbundling obligation to a total of two DS3s per requesting carrier to any single customer location" because "the record confirms that it is economically possible to self-deploy at a three DS3 loop level to a particular customer location." *TRO* ¶ 324; see also 47 C.F.R. § 51.319(a)(5)(iii) (codifying cap). The cap applied on a per-carrier basis: in other words, each separate requesting carrier could obtain two DS3s at a location. The issue here was over how to carry out the two-DS3 "cap" on loops in practice. As explained in our resolution of SBC UNE Issue 1, however, the Agreement should not include any language regarding the unbundling of DS3 loops in any quantity. MCI's proposed Section 9.6 is rejected and UNE Issue 33 is dismissed as moot. Notably, Staff witness Dr. Zolnierek agrees with our resolution here.

Alternative 2 (If Alternative 1 Not Adopted)

For DS3 loops, the *TRO* "limit[ed] an incumbent LEC's unbundling obligation to a total of two DS3s per requesting carrier to any single customer location" because "the record confirms that it is economically possible to self-deploy at a three DS3 loop level to a particular customer location." *TRO* ¶ 324; see also 47 C.F.R. § 51.319(a)(5)(iii) (codifying cap). The cap applied on

a per-carrier basis: in other words, each separate requesting carrier could obtain two DS3s at a location. The issue here was over how to carry out the two-DS3 "cap" on loops in practice.

We adopt SBC's proposed language for Section 3.6.1. Both parties agree that MCI is not entitled to UNEs beyond the FCC cap. Both parties agree that SBC may reject outright an MCI order that exceeds the cap: MCI's Mr. Price went so far as to say that "it is fine for SBC to reject the order."

There are two disputed points. First, SBC's proposed language states that SBC may accept the MCI order – a result that benefits MCI – but charge MCI the rates under its access tariff as opposed to the UNE rates. If MCI does not want to pay the rates that apply to loops above the cap, it should not order loops that exceed the cap. The cap applies to each *customer*, not to the incumbent (*i.e.* each CLEC is entitled to two DS3s, regardless of how many DS3s SBC provided), and each customer should know how many loops it has ordered.

The second dispute relates to SBC's proposal that if SBC *accepts* the order that acceptance does not constitute a waiver of the cap for future orders. That way, SBC would not be punished for inadvertently accepting an order that exceeds the cap, and MCI would not be encouraged to submit orders that exceed the cap in the hope that SBC might miss one, leading MCI to contend that SBC has waived the cap for all time. MCI does not oppose this language in its testimony.

For the reasons above, SBC's proposed language is adopted.

UNE ISSUE 34: WHAT TERMS AND CONDITIONS SHALL APPLY FOR ROUTINE MODIFICATIONS OF LOCAL LOOPS?

ICA References: UNE §§ 9.7.1, 9.7.2, 9.7.2.1, 9.7.2.2, 9.7.3

In Sections 9.7.1 through 9.7.3, SBC has proposed language implementing the rules for routine network modifications of local loops adopted by the *TRO*. MCI objects to SBC's language, but has not identified any valid basis for its objections. We adopt SBC's language.

SBC's proposed Section 9.7.1 states that SBC is required to make routine network modifications to unbundled local loop facilities used by MCI only where the requested loop facility has already been constructed. The language for Section 9.7.1 is taken verbatim from the FCC's rules. 47 C.F.R. § 51.319(a)(8)(i); see also *TRO* ¶ 632. MCI did not even address Section 9.7.1 in its testimony, much less provide an explanation for its objection of that section.

Similarly, the language proposed by SBC for Section 9.7.2 is intended to clarify the obligations for routine network modifications set forth in FCC Rule 319(a)(8)(ii). Specifically, that language provides that routine network modifications do not include the construction of *new* facilities, such as trenching, placing new aerial or buried cable, constructing new manholes, conduits or terminals, or obtaining new rights or way for a requesting carrier. Each of these exclusions is taken directly from the FCC's description of routine network modifications. *TRO* ¶¶ 636-37. In addition, Section 9.7.2 clarifies that SBC is not obligated to provide MCI the optronics to light dark fiber. Again, this language is consistent with the *TRO*, which makes clear

that dark fiber is to be activated by competing carriers using *self-provided* optronic equipment. *TRO* ¶¶ 311, 313, 329, 381.

MCI also objects to language proposed by SBC for Sections 9.7 and 9.7.2.2, which includes restrictions related to packet based facilities. This language, however, is consistent with the FCC's rulings that (i) ILECs are not required to unbundled 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 (*TRO* ¶ 288), and (ii) competitive LECs are not entitled to unbundled access to the packet based networks of incumbent LECs. *Id*. ¶ 290.

MCI also objected to SBC's proposed Section 9.7.2, which states that a routine network modification is "an activity that SBC Illinois regularly undertakes for its own end user customers where there are no additional charges or minimum term commitments." MCI witness, Mr. Starkey, asserted: "SBC's mention of additional charges and term commitments has no basis in the *TRO*." We disagree. In fact, paragraphs 645 through 648 of the *TRO* explain that ILECs can and do construct new transmission facilities for retail customers, subject to term agreements or upon payment of special construction charges, without taking on the obligation to perform similar construction activities for CLECs. The *TRO* makes clear that these arrangements are appropriate (¶¶ 645-46), and defines the manner in which CLECs can obtain unbundled access to such facilities – but only after they have been built for a retail customer and subject to any special construction charges or term provisions that ILECs impose on their retail customers (¶¶ 647-48).

Finally, MCI objects to SBC's proposed language in Section 9.7.3, which would allow SBC to recover the costs associated with routine network modifications. MCI's objection is without merit for the reasons we discussed above in connection with our resolution of Pricing Issue 19.

For these reasons, we adopt SBC's proposed language.

UNE ISSUE 35: WHAT TERMS SHOULD APPLY FOR ACCESS TO LOOPS SERVED OVER INTEGRATED DIGITAL LOOP CARRIER ("IDLC")?

ICA Reference: UNE § 9.8.1

Integrated digital loop carrier ("IDLC") is a type of digital loop carrier ("DLC") technology that directly terminates the single signal into the SBC switch, without going through the main distribution frame. Unlike universal DLC ("UDLC"), IDLC technology does not require central office terminal equipment to demultiplex high capacity signals to DSO or voice grade levels. As a result, however, it is not possible to unbundle loops served over an IDLC. Consistent with the requirements of the *TRO* (at ¶ 297), the Commission adopts SBC's proposed Section 9.12, which provides that where MCI requests a UNE loop served by an IDLC, SBC will, where available, move the requested loop to either a spare copper facility or to a UDLC loop at no additional charge to MCI. If no such facilities are available, SBC will notify MCI of the lack of the available facilities. As Mr. Weydeck testified, SBC's engineering guidelines have

been modified to ensure that UDLC or copper cabling is available on a going-forward basis in locations where IDLC is also being utilized to provide service. Currently, areas served by IDLC-only technology represent only 2,528 lines of the 6.9 million SBC access lines. Accordingly, the situations in which spare unbundled loop are not available to fulfill a request by MCI for a transmission path is likely to be rare.

The Commission rejects MCI's proposed language for Section 9.8.1, pursuant to which it would have the unilateral right to dictate a method of access to IDLC delivered loops, including, not limited to, six methods described in subsection 9.8.1.1 through 9.8.1.6. MCI's proposal is not supported by the *TRO* and would improperly usurp SBC's ability to manage and deploy its network in a most efficient and reliable manner. The *TRO* does not give requesting CLECs the right to unilaterally specify methods of access to IDLC loops. Rather, the *TRO* permits ILECs to provide such access through a spare copper facility or through the availability of UDLC systems. Where such options are not available, the *TRO* requires only that ILECs "present requesting carriers a technically feasible method of unbundled access." *TRO* ¶ 297. Accordingly, the FCC leaves the choice of how a loop is unbundled in the IDLC-only architecture entirely to the ILEC's discretion, and MCI should not be entitled to dictate the terms and conditions of this unbundling.

This interpretation of the *TRO* is confirmed by the decision of the FCC's Wireline Competition Bureau (the "WCB") in the *Verizon Virginia/Cavalier Arbitration*.[6] In that case, the Bureau considered contract language proposed by Cavalier, similar to the language proposed by MCI in this case, specifying certain methods by which Verizon would be required to unbundled IDLC loops. The methods proposed by Cavalier were the same as those proposed by MCI in Section 9.8.1. In rejecting Cavalier's proposed language, the Bureau made clear that "the Triennial Review Order does not require Verizon to use the particular methods proposed by Cavalier," but, rather, "gives incumbent LECs the choice whether to unbundle integrated DLC loops when spare facilities are available, and the choice of technically feasible methods of integrated DLC loop unbundling." *Id*. ¶¶ 131, 133.

UNE ISSUE 36: SHOULD ACCESS TO LOOPS THAT REQUIRE HIGH VOLTAGE PROTECTIVE EQUIPMENT BE ORDERED THROUGH THE BFR PROCESS?

ICA Reference: UNE § 9.10

SBC's proposed Section 9.10 requires that any request for a loop to a high voltage area must be made through the bonafide request ("BFR") process and that MCI pay for high voltage protective equipment ("HVPE") provisioned by SBC in connection with that loop. The undisputed evidence shows that SBC must make special preparations when placing a loop in a high voltage area, including adding HVPE to ensure the safety and integrity of the network and

[6] Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration, WC Docket No. 02-0359, Memorandum Opinion and Order, DA 03-3947 (rel. Dec. 12, 2003).

the customers and employees of both SBC and MCI. Every situation presents unique issues and the BFR process allows SBC to identify and address those issues.

MCI opposes Section 9.10, arguing that the provisioning of unbundled loops in a high voltage environment is a routine network modification. The provision of loops to a high voltage area, however, demands "far more planning, engineering, and technical resources than the routine modifications" described in the *TRO*. *TRO* ¶ 636. Specifically, as SBC's Mr. Weydeck explained, such provisioning requires site visits by both electrical protection and outside plant engineers to determine the 300-volt peak point and to evaluate the steps that will be needed to complete the undertaking. Based on this evaluation, SBC construction personnel must in turn order specialized dielectric cable (19 or 22 gauge) and high voltage protection equipment. Because the specialized dielectric cable must be free of any intermediate splices, the loop must be placed from the demarcation point in the high voltage environment to a splice point on an existing cable that meets the 300 volt peak point standard. Placing cable in this manner to avoid intermediate splicing creates the need to secure permits or rights of way and place conduit, activities which the *TRO* expressly recognizes as falling *outside* the definition of a routine network modification. *TRO* ¶ 637.

Moreover, the Commission finds that the costs of HVPE, such as a positron, are not included in the recurring unbundled loop costs that were determined in Docket No. 02-0864. Accordingly, the inclusion of HVPE does create a customized version of an unbundled loop. The Commission, therefore, approves SBC's proposed language for Section 9.10 which would require MCI, as the cost causer, to reimburse SBC for the costs associated with the provisioning of HVPE in connection with a loop ordered to a high voltage area.

UNE ISSUE 37: **IN ADDITION TO THE DECLASSIFICATION SECTION CONTAINED IN SECTION 5, SHOULD THE CONTRACT CONTAIN SEPARATE DEDICATED TRANSPORT DECLASSIFICATION SECTIONS?**

ICA Reference: UNE § 15.5

Alternative 1

SBC's proposed language for Section 15.5 provides that SBC need only provide dedicated transport where it has not been "declassified" by FCC or court order (subject to a 30-day transition plan). As shown above and under SBC UNE Issue No. 3, dedicated transport has already been "declassified" by the mandate in *USTA II*, so the ICA should not include any language regarding the unbundling of dedicated transport at all. The Commission agrees with SBC and Staff that Section 15.5 should be deleted in its entirety, and UNE Issue 37 is accordingly dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

SBC's proposed language for Section 15.5 provides that SBC need only provide dedicated transport where it has not been "declassified" by FCC or court order (subject to a 30-day transition plan). The Commission adopts SBC's proposed Section 15.5 and rejects MCI's proposal to force SBC to initiate a "change of law" process for mass market switching. Simply

put, the unbundling requirements for dedicated transport have already been vacated, and recognizing that vacatur is not a "change of law." While MCI contends that "declassification" language for dedicated transport would be redundant in light of the general declassification language in Section 5 of the Agreement, the language proposed by SBC would be helpful, as it would make the Agreement's provisions on dedicated transport "self-contained," so that the reader does not have to look in one section for unbundling and another for declassification.

UNE ISSUE 38: SHOULD SBC BE REQUIRED TO PROVISION UNE LOOPS TO CELL SITES OR OTHER LOCATIONS THAT DO NOT CONSTITUTE AN END USER CUSTOMER PREMISE?

ICA Reference: UNE § 9.12

The Commission adopts SBC's proposed Section 9.12, which states that SBC has no obligation to provision UNE loops to cellular mobile radio service ("CMRS") cell sites or any other locations that do not constitute end user customer premises. SBC's proposal is supported by the FCC's rules, which define a local loop UNE as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC's central office and the loop demarcation point *at an end user customer premises*." 47 C.F.R. § 51.319(a) (emphasis added). A CMRS, or wireless, carrier is an "end user" only "when such carrier uses a telecommunications service for administrative purposes." 47 C.F.R. § 69.2. A cell site is not used by wireless carriers for "administrative purposes." Rather, a cell site is an assembly of transmitters/receiver equipment operated by the wireless providers, through which radio links are established between the wireless system and the wireless unit of the wireless carrier's customers, who are the true "end users" of telecommunications services. Accordingly, a cell site is not an "end user premises."

MCI appears to agree that SBC has no obligation to provide UNE loops to locations that do not constitute "end user customer premises." MCI also does not contend that wireless carriers are "end users" of telecommunications services. Nonetheless, MCI objects to Section 9.12 on the grounds that it might be interpreted to prevent MCI from using UNE loops to serve an end user customer at a location, such as a shopping mall, at which a cellular site also happens to be located. The Commission rejects MCI's argument as unfounded. The term "cellular site" refers to a transmitter or receiver device, not to the building in, or on top of, which the "transmitter or receiver" happens to be located.

UNE ISSUE 40: SHOULD SBC'S PROPOSED DEFINITION PERTAINING TO SUBLOOPS BE INCLUDED IN THE AGREEMENT?

ICA References: UNE §§ 10.2 *et seq.*, 10.3.1.1, 10.3.1.2, 10.3.1.3, 10.3.1.4, 10.3.1.5

SBC proposes to include definitions to describe the various subloops that SBC is required to make available on an unbundled basis under the FCC's rules. The Commission finds that these definitions are necessary to add clarity to the ICA and avoid disagreements in the future. The Commission also rejects MCI's view that SBC's proposed language defines subloops "too

narrowly." The FCC's rules strictly limit the definition of the copper subloop UNE to the "*distribution portion* of the copper loop that is technically feasible to access at terminals in the incumbent's *outside* plant (*i.e.*, *outside its central offices*) including inside wire," and expressly "do not require incumbent LECs to provide unbundled access to their *feeder loop* plant as stand-alone UNEs." *TRO* ¶ 254 (emphasis added). SBC's subloop definitions limit SBC's subloop unbundling obligations to the distribution plant and, therefore, are fully consistent with the FCC's rules.

UNE ISSUE 41: AT WHAT SPECIFIC POINTS SHOULD SBC BE REQUIRED TO PROVIDE MCI WITH ACCESS TO SUBLOOPS?

ICA References: UNE §§ 10.5.1.3, 10.5.1.5, 10.6.

SBC agrees to provide MCI with access to subloops at the FDI/SAI and the single point of interconnection ("SPOI"), as reflected in Section 10.6 of the UNE Appendix. MCI proposes language that would require SBC to provide MCI with access to subloops at the main distribution frame ("MDF") and would require SBC to provide the following subloop segments: MDF to the Serving Area Interface or Feeder Distribution Interface ("SAI/FDI"), from MDF to the terminal, from the Optical Carrier Device ("OCD") to the terminal, and from the OCD to SAI/FDI. MCI §§ 10.5.1.3, 10.6. The MDF and OCD are both located in the Central Office, and each of the subloop segments which start at the MDF or OCD are part of the feeder plant, a fact which MCI acknowledges. As discussed in connection with UNE Issue 40, however, the *TRO* makes clear that SBC has no obligation to provide MCI with unbundled access to the feeder loop plant. *TRO* ¶ 254. Moreover, the *TRO* and the FCC's rules make clear that SBC is required to provide access to subloops only at technically feasible points within its "outside plant." 47 C.F.R. § 51.319(b)(1)(i). Accordingly, SBC has no obligation to provide MCI with access to subloop segments that begin at either the MDF or the OCD. The Commission finds the Michigan arbitration decision cited by MCI inapposite, as it was rendered *before* the issuance of the *TRO* on August 21, 2003.

Furthermore, the OCD is the aggregation point for the broadband portion of hybrid loops that use packetized functionality. SBC's unbundling obligations do not extend to functions and capabilities of the hybrid loop that are used to transmit packetized information. 47 C.F.R. § 51.319(a)(2)(ii). Accordingly, the Commission rejects the language proposed by MCI.

UNE ISSUE 42: SHOULD MCIM BE REQUIRED TO USE THE BFR PROCESS TO REQUEST ACCESS TO SUBLOOP SEGMENTS NOT LISTED IN SECTION 10.6 OF THIS UNE APPENDIX?

ICA Reference: UNE § 10.6

SBC proposes that Section 10.6, which contains a list of the lawful UNE subloop segments available to MCI, include a footnote indicating that when MCI requests a subloop segment not identified in Section 10.6, MCI should use the BFR process to request that segment (unless, of course, the segment has been declassified, as the feeder portion was, in which case

SBC is not required to provide unbundled access). As discussed in connection with UNE Issue 20, the Commission finds that the BFR process is an appropriate process for meeting the needs and requirements for new, non-identified subloop segments.

The Commission disagrees with MCI's contention that a reference to the BFR process in Section 10.6 is unnecessary because the process by which subloops are provided is governed by Section 10.9 of the UNE Appendix. Section 10.9 describes the process (Subloop Access Arrangements) by which MCI obtains access to subloops that are specified in Section 10.6. The BFR process, on the other hand, is a means for CLECs to request unbundled network elements, including lawful UNE subloops, that are not specifically identified in the ICA. Thus, Section 10.9 does not eliminate the need to refer to the BFR process in Section 10.6.

UNE ISSUE 44: SHOULD COLLOCATION OR A SPECIAL CONSTRUCTION ARRANGEMENT BE REQUIRED TO ACCESS SUBLOOPS?

ICA References: UNE §§ 10.9.1, 10.9.2, 10.9.8

SBC's proposed Sections 10.9.1, 10.9.2, and 10.9.8 provide two methods by which MCI may access subloops in order to combine with them with other network elements: (i) establishing collocation via the collocation process; and (ii) establishing a subloop access arrangement ("SAA") using the Special Construction Arrangement ("SCA"). MCI alleges that SBC's proposed methods would create unnecessary, complexity and delay, but does not explain how such dire consequences would result. Furthermore, MCI's proposed contract language does not identify any alternative method for obtaining access to subloops. Without SBC's proposed language, Section 10.9 could be construed to provide MCI with unfettered direct access to SBC's plant. MCI, however, is not legally entitled to such access, which could jeopardize network integrity and customer service. The FCC has repeatedly held that an ILEC controls its own network.[7] Accordingly, the Commission adopts SBC's proposed Sections 10.9.1, 10.9.2, and 10.9.8, and finds in SBC's favor.

UNE ISSUE 45: WHAT COSTS MAY SBC PROPERLY CHARGE MCIM FOR PROVIDING ECS?

ICA References: UNE §§ 1.11.2.1 through 11.2.6

An Engineering Controlled Splice ("ECS") is basically a cross-connect box introduced in or near a remote terminals ("RT") site to allow a CLEC access to the copper distribution cables leaving the RT. SBC's proposed language for Sections 11.2.1 through 11.2.6 of the UNE Appendix establishes the mechanism for recovery of the costs associated with constructing an

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[7] *Local Competition Order*, ¶ 203 ("each carrier must be able to retain responsibility for the management, control, and performance of its own network"); *First Report and Order And Further Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 14 FCCR 4761, March 31, 1999 ("*706 Order*" or "*Advanced Services Order*"), ¶ 46 ("incumbent LECs should be permitted reasonable security arrangements to ensure network security and reliability"); *Collocation Remand Order*, ¶¶ 90-91, 102.

ECS arrangement at the request of MCI. Under SBC's proposal, if MCI requests an ECS arrangement, it would be required to follow the Special Construction Arrangement ("SCA") process and the arrangement would be priced appropriately to allow SBC to recover the cost to reconfigure its network to benefit MCI. MCI would be obligated to pay all actual construction, labor, materials and related provisioning on a time and material basis.

The Commission finds that SBC's proposal tracks precisely the kinds of ECS costs – and the manner of their recovery – that the FCC described and approved in its *Project Pronto Waiver Order*. *Ameritech Corp and SBC Communications, Inc.*, CC Docket 98-141, ASD File No. 99-49, *Second Memorandum and Order*, FCC 00-336 (Rel. Sept. 8, 2000) at Appendix A, § 5(d). Specifically, the FCC stated that a "telecommunications carrier requesting such a SCA shall pay all of the actual construction, labor, materials and related provisioning costs incurred to fulfill its SCA on a time and materials basis." *Id*. at Appendix A, § 5(d)(4).

MCI takes the position that it should not be required to reimburse SBC for any of the costs of providing ECS. MCI argues that the ECS arrangement is required because SBC has specifically designed its Project Pronto network in an inefficient, discriminatory manner. MCI's argument is without merit. By not placing a cross-connect field at each RT, SBC is able to use the space that would have been necessary for the cross-connect field for the placement of DLC equipment. Including additional line distribution and cross-connects in each DLC cabinet, as MCI proposes, would have significantly increased the cost of DLC deployment due to the cost of the cross-connect itself, its wiring and the consequent requirement for additional and larger cabinets. SBC's deployment plan allows for placing physically smaller RTs, requiring the acquisition of smaller easements, and reducing the number of locations where commercial power must be made available. SBC is then able to serve multiple SAIs/FDI locations from a single RT. If SBC had used the Project Pronto RTs for the SAI/FDI cross-connection locations, as suggested by MCI, this would have required that all of the distribution pairs from the multiple areas served by SAI/FDIs be extended to the RT location, resulting in the need for larger cable placements. Alternatively, placing a cross-connect at the RT and at the SAI/FDI locations would have created additional administration points of failure in the network, and would have increased the space needed at each RT to house the additional cross-connect points.

MCI also suggests that construction of an ECS is a "routine network modification." That is incorrect because, at a minimum, an ECS would require significant construction to (i) secure permits for additional rights of way, (ii) install new a terminal similar to a serving area interface ("SAI"); and (iii) place a new manhole or handhole over the new splice that would be created. Moreover, there is a strong possibility that new conduit would have to be placed from the new manhole or handhole to the RT pulling new cable. These are all activities that the *TRO* specifically excludes from the definition of a "routine network modification." *TRO* ¶ 637.

Finally, MCI asserts that Section 19 of the FCC's rules (47 C.F.R. § 51.319) prohibits the cost recovery mechanism sought by SBC. This assertion is without merit because the ECS is not a subloop or any kind of UNE, and FCC Rule 319 does not purport to create any "ECS UNE." MCI is correct that the FCC modified Section 319 of its rules to incorporate subloop unbundling requirements in the *UNE Remand Order*, but that is irrelevant. Even if FCC Rule 319 were otherwise applicable to the ECS (which it is not), the FCC issued the *UNE Remand Order* almost

a year before the *Project Pronto Waiver Order*. The FCC – which promulgated Section 319 in the first place – was aware of its own rules when it issued that Order.

UNE ISSUE 46: SHOULD THE COMMISSION ADOPT SBC'S LANGUAGE PROVIDING TWO OPTIONS FOR IMPLEMENTING ECS?

ICA References: UNE § 11.3 *et seq.*

SBC has identified two options for the provision of ECS: the dedicated facility option ("DFO") and the cross-connected facility option ("CFO"). Terms and conditions related to those two options are set forth in SBC's proposed Section 11.3 of the UNE Appendix. The Commission finds that SBC's proposal is reasonable because the DFO and the CFO are the two construction options currently available to provide the ECS to CLECs. MCI asserts that SBC is attempting to "limit" the options by which MCI can use ECS to obtain access to subloops. MCI, however, failed to identify any construction option for establishing the ECS other than the two offered by SBC. In fact, no CLEC in Illinois or in any of SBC's 13 states has ordered an ECS. Nonetheless, SBC has stated that it is willing to consider other options for the ECS that MCI may propose via the BFR process. An interconnection agreement cannot anticipate every conceivable interconnection method and must contain general rules that are applied on a case by case basis, such as SBC proposes with the BFR process here.

UNE ISSUE 47: SHOULD THE DEMARCATION POINTS FOR ACCESS TO DARK FIBER INCLUDE REMOTE TERMINALS?

ICA Reference: UNE § 12.9.1

Alternative 1

UNE Issue 47 concerns terms and conditions for unbundled Dark Fiber. As explained in Section I, the Commission holds that the ICA should not contain any terms and conditions for unbundled Dark Fiber. Therefore, Section 12 is deleted in its entirety and UNE Issue 47 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission rejects MCI's proposed language for Section 12.9.1. A "demarcation point" is the point that marks the end of wiring under control of SBC and the beginning under control of the property owner or subscriber. 47 C.F.R. § 68.3. Section 12.9.1 of the UNE Appendix provides for demarcation points of lawful UNE dedicated transport dark fiber and loop dark fiber at central offices and end user customer premises. MCI's proposal to add "remote terminals" as an additional demarcation point is rejected for two reasons. First, FCC Rule 51.319(a) defines the local loop as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end user customer premises." 47 C.F.R. § 51.319(a). MCI's proposed reference to remote terminals is inconsistent with this definition because a remote terminal is neither in the central office nor the demarcation point at the end user customer premise. Second, the FCC clearly limited the definition of dedicated transport to those transmission facilities connecting incumbent LEC

switches and wire centers within a LATA. MCI's proposal to include remote terminals as a "demarcation point" would be inappropriate on that ground as well.

MCI witness Price asserted that inclusion of the term "remote terminal" in Section 12.9.1 is necessary because SBC sometimes serves multi-tenant buildings by using a remote terminal in the building. As SBC's Mr. Weydeck explained, however, if a remote terminal is located at a customer premises, the demarcation point would be the approved splitter shelf and not the remote terminal.

UNE ISSUE 48: **WHICH PARTY'S REQUIREMENTS FOR ROUTINE NETWORK MODIFICATION WITH RESPECT TO DARK FIBER SHOULD BE INCLUDED IN THIS AGREEMENT?**

ICA Reference: UNE § 12.11.1

Alternative 1

UNE Issue 48 concerns terms and conditions for unbundled Dark Fiber. As explained in Section I, the Commission holds that the ICA should not contain any terms and conditions for unbundled Dark Fiber. Therefore, Section 12 is deleted in its entirety and UNE Issue 48 is dismissed as moot.

Alternative 3

The Commission adopts SBC's proposed language for Section 12.11.1. That section addresses SBC's obligations to make routine network modifications to dark fiber loop and transport facilities. SBC's language is consistent with the rules for routine network modifications established by the FCC. *TRO* ¶ 634; 47 C.F.R. § 51.319(a)(8)(ii). MCI, on the other hand, proposes to include in Section 12.11.1 a vague, generic cross-reference to the routine network modifications requirements for "lit" loops and transport facilities. SBC's language is preferable because it is specific to dark fiber (the topic of Section 12 of the UNE Appendix) and more clearly comports with the FCC's routine network modification requirements.

UNE ISSUE 49: **TO AID IN DETERMINING THE UNBUNDLING OF DARK FIBER AND/OR DEDICATED TRANSPORT AT A PARTICULAR LOCATION, SHOULD MCI REPORT ON ITS ABILITY TO SELF-DEPLOY TRANSPORT AT LEAST ONCE A YEAR?**

ICA References: UNE §§ 12.12 *et seq.*; 15.6 *et seq.*

UNE Issue 49 concerns terms and conditions for unbundled Dark Fiber. As explained in Section I, the Commission holds that the ICA should not contain any terms and conditions for unbundled Dark Fiber. Therefore, Sections 12 and 15 are deleted in their entirety and UNE Issue 49 is dismissed as moot.

UNE ISSUE 51: **SHOULD MCI BE REQUIRED TO SUBMIT A BFR FOR SWITCH FEATURES THAT ARE NOT CURRENTLY ACTIVATED, THUS NOT OFFERED BY SBC? SHOULD MCI PAY ALL RELATED COSTS INCURRED BY SBC TO ACTIVATE (TURN UP) THE REQUESTED FEATURE?**

ICA Reference: UNE §§ 13.2.2, 13.2.3

Alternative 1

UNE Issue 51 relates to the unbundled local switching section of the UNE Appendix (Section 13). As explained in Section I, the Commission holds that the ICA should not contain any terms and conditions for unbundled switching. Therefore, Section 13 is deleted in its entirety and UNE Issue 51 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's language for Sections 13.2.2 and 13.2.3. These sections describe the switch features that are available with an unbundled switch port purchased by a CLEC and further provides that the bone fide request ("BFR") process is the accepted, established process to use when a CLEC wants SBC to develop a new switch functionality that is not currently available.

Under Section 13.2.2, MCI has access to all features which are "loaded" and "activated" in the switch. A feature is "loaded" on a switch if the software that enables that feature is present in the switch. A feature is "activated" if SBC has the authorization and the enabling password from the switch vendor. A switch feature can be "loaded" but not "activated" because vendors design software so that many features are contained in a software load, but are not available until activated by a password. The password must be purchased from the vendor. The vendor does this so it can sell a standard software package without customizing it for each buyer.

SBC makes available to CLECs all switch features and functionalities that are loaded and activated and that it can use itself to provide services to end users. SBC does not make available features that are not loaded (obviously, software to support such features is not present in the switch) and activated (because such features are not paid for and consequently it does not have the vendors permission to use). Nor does SBC use any features for itself that are not also available to CLECs that use its unbundled local switching.

The Commission adopts SBC's language on several grounds. *First,* SBC's language does no more than describe the reality of how switch software operates in the network. *Second*, in Docket 01-0614, the Commission approved SBC's unbundled local switching tariff with language that limits feature availability to those that SBC "makes available to its end user customer." ILL. C.C. NO. 20, Part 19, Section 21, 1st Revised Sheet No. 4. *Third,* in the above-referenced docket, the Commission approved SBC's use of the BFR process to request switch features that are not loaded and activated on the switch. The BFR is necessary for two primary reasons: (1) switch features when activated may interact with existing services and must be evaluated; and (2) SBC should be allowed to recover the cost of providing additional features at a CLECs request that SBC is not providing to itself.

Fourth, SBC's BFR process has been in place since 1996, and the Commission has upheld that process as reasonable no fewer than four times. *See Arbitration Decision*, Dockets 96-AB-003/96-AB-004, at 50 (upholding 30-day period for Ameritech to respond to a BFR with a preliminary analysis); *Arbitration Decision*, Docket 96-AB-006, at 30 (upholding 120-day maximum interval for final response to BFR); *Arbitration Decision*, Docket 01-0338 at 23 (finding that BFR process was appropriate); *Arbitration Decision*, Docket 00-0769, at 15-16 (same). *Fifth*, as discussed in UNE Issue 59, the FCC found in the *Bell South 271 Order* that a CLEC can be required to use the BFR process to request a new switch capability.

MCI raises three arguments in opposition, but none withstand scrutiny. First, MCI contends SBC's language is overly restrictive because SBC will offer switch features only if all licensing fees are paid and if SBC has ordering, billing and provision processes in place. There is nothing unreasonable about these conditions. The suggestion that SBC could offer a switch feature without an appropriate vendor license reflects a misunderstanding of intellectual property law. Nor is there anything unreasonable about offering a new service only when the ordering, billing and provisioning processes are in place. Without such processes, it would be impossible for MCI to order, for SBC to provision, and for SBC to get paid. Second, MCI contends that the BFR process should not apply to switching UNE, but MCI already agreed in the BFR Appendix to a process that applies to any request for "a customized service for features, capabilities, functionalities . . . not otherwise provided." Finally, MCI argues that SBC's language would create a "disincentive" for it to employ the latest software upgrades. The Commission rejects MCI's argument as unfounded, because SBC has every incentive to compete in the marketplace by providing the switch features and capabilities with its end users demand. Indeed, the more features SBC can provide, the better will be able to compete with wireless, cable and VoIP providers.

UNE ISSUE 52: UNDER WHAT CIRCUMSTANCE SHOULD MCIM'S REQUEST FOR NEW ULS PROCESSES BE SUBMITTED TO A BFR?

ICA Reference: UNE § 13.2.9

In Section 13.2.9, SBC proposes that the BFR process apply to requests that SBC develop special processes for access to unbundled local switching. The language also makes clear that the parties will comply with any applicable Change Management Process ("CMP") guidelines.

The Commission adopts SBC's proposal in order to distinguish between an MCI-specific process change and those that correct a problem that impacts the CLEC community as a whole (*e.g.*, a general problem with ordering or billing processes.) For the latter, the CMP invites participation by the entire CLEC community to identify problems with existing SBC products. SBC is required to remedy such problems and does so without payment from CLECs. Where a *single* CLEC requests the development of a process unique to that CLEC, however, the BFR process should apply so that SBC can assess the feasibility of the request and can receive payment from the CLEC for the work effort. The BFR process is the only defined method that allows CLECs to communicate precise engineering and operational requirements associated with the request.

MCI contends that SBC's language is unnecessary because the CMP already sets forth procedures for process change. MCI's objection misses the mark. SBC's proposal is consistent with the CMP and expressly states that "the parties will comply with any applicable Change Management guidelines." The CMP guidelines, however, do not apply to a request made by a single CLEC for a unique process to accommodate only that CLEC's business plans. In those situations, any process changes would result in benefit to a single requesting CLEC, the Commission finds that that CLEC is the cost causer, and that CLEC should pay SBC for any costs SBC incurs.

UNE ISSUE 53: **SHOULD THE LAWFUL UNE APPENDIX CONTAIN A DECLASSIFICATION PLAN FOR MASS MARKET SWITCHING?**

ICA Reference: UNE § 13.3

Alternative 1

SBC's proposed language for Section 13.3 states an undeniable point: that SBC should provide switching for mass market customers only in those geographic areas where mass market switching has not been "declassified." As shown under Section I above and SBC UNE Issue 3, mass market switching has already been "declassified" by the mandate in *USTA II*, so the Agreement should not include any language regarding the unbundling of mass market switching anywhere. Section 13.3 should be deleted in its entirety and UNE Issue 53 is hereby dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed Section 13.3 and rejects MCI's proposal to force SBC to initiate a "change of law" process for mass market switching. Simply put, the unbundling requirements for mass market switching have already been vacated, and recognizing that vacatur is not a "change of law."

UNE ISSUE 54: **TO WHAT EXTENT SHOULD SBC ILLINOIS BE REQUIRED TO OFFER ULS TO ENTERPRISE MARKET CUSTOMERS?**

ICA References: MCI UNE §§ 13.3, 13.4.1, SBC UNE § 13.4 *et seq*.

The *TRO* made a national finding of non-impairment for switching used to serve "enterprise" customers, who "are or could be served by competitors using DS1 capacity and above facilities." *TRO* ¶ 425. The FCC recognized that "[a]t some point, customers taking a sufficient number of multiple DS0 loops could be served in a manner similar to that described above for enterprise customers – that is, voice services provided over one or several DS1s." *Id.* ¶ 479. The FCC established a presumptive "cutoff" of four DS0s that would apply "absent significant evidence to the contrary" in the *UNE Remand Order* and confirmed that same rule in the *TRO* (¶ 479).

MCI agrees it is not entitled to unbundled local switching for customers that are *currently* served using DS1 facilities. But MCI seeks unbundled local switching for customers that "could be served" using DS1 facilities because they use four or more DS0 lines. The Commission adopts SBC's proposed language, which recognizes the FCC's presumptive cutoff and defines enterprise switching to include customers with four or more DS0s. SBC's proposal is consistent with Staff's testimony in Docket No. 03-0595, which recommended a four-DS0 "cutoff" between mass market and enterprise switching.

UNE ISSUES 55 & 56: WHICH PARTY'S DESCRIPTION OF CUSTOMIZED ROUTING BEST DESCRIBES THIS ULS FEATURE?

ICA Reference: UNE § 14.1.4.1

When an SBC customer dials "0", the switch routes that call onto dedicated facilities that carry the call to an SBC operator served by an OS/DA host switch. When MCI purchases a UNE platform from SBC, the switch continues to route those "0"-dialed calls to an SBC operator. MCI, at its option, may request a feature known as "customized routing" that routes those "0" dialed calls to an MCI operator over MCI's dedicated facilities. SBC offers two kinds of custom routing – one that routes calls to MCI's operators through the use of line class codes, and another that routes calls to MCI's operators through use of the Advanced Intelligent Network ("AIN") capabilities of the network.

The dispute in UNE Issues 55 and 56 concerns MCI's demand that SBC develop a third type called "customized routing over Feature Group D." Consistent with its decision in the recently-completed AT&T Arbitration in (Docket 03-0329, at 86-89), and in the investigation under section 271 (Docket No, 01-0662, ¶¶ 1985-86), the Commission finds that SBC has no obligation to provide custom routing over FGD.

Moreover, MCI's proposed language would require SBC to "commingle" OS/DA traffic on existing Feature Group D trunks, but it is not now technically feasible to do so because SBC does not utilize Feature Group D ("FGD") signaling for signaling to OS/DA Host switches. Further, the BFR process is the appropriate mechanism to request the development of this functionality. MCI's language would unconditionally obligate SBC to engage in a full-scale research and development effort to deploy this capability. SBC is willing to work with MCI to develop a technically feasible solution, but MCI should pay for this development work.

MCI argues that customized routing over FGD is technically feasible and that SBC is required to provide it under the provisions of 13-1801(b)(2) of the PUA. MCI is wrong. First, even if customized routing over FGD is available in some Verizon territory, that says nothing about what it would take to develop it in SBC's network. SBC witness Novack was clear that this capability does not exist in SBC's network and that it would take, at the very least, millions of dollars to attempt to develop it.

MCI's discussion of Section 13-801(b)(2) misrepresents Illinois law. Section 13-801(b)(2) does not require SBC to provide customized routing over Feature Group D simply because MCI has obtained a similar arrangement from Verizon in a different state. The statute

makes clear that SBC is only obligated to provide in Illinois arrangements that its "local exchange carrier affiliate" obtains in another state from an ILEC.

UNE ISSUE 57: **IF MCI ELECTS CUSTOMIZED ROUTING IN A GIVEN SWITCH, SHOULD ALL ULS END USERS IN THAT SWITCH BE REQUIRED TO ROUTE OVER THE SAME CUSTOM ROUTE?**

ICA Reference: UNE § 14.1.4.1.1

SBC's language describes a network operational reality that cannot be changed. When MCI issues an instruction to custom route OS/DA calls made by its UNE-P customers in a particular SBC end office, all such MCI traffic must be custom routed in the same way. SBC's switch is not capable of routing the OS/DA traffic of MCI Customer X to one location, and the OS/DA traffic of MCI Customer Y to a different location. The reality of this technical limitation is reflected in SBC's language for Section 14.1.4.1.1, and is uncontested by MCI. The Commission accordingly adopts SBC's proposal.

UNE ISSUE 58: **SHOULD AIN-BASED CUSTOM ROUTING BE THE DEFAULT METHOD, UNLESS MCI REQUESTS ANOTHER METHOD VIA A BFR?**

ICA References: UNE §§ 14.1.4.3, 14.1.4.4

SBC's proposal for Section 14.1.4.3 presents the same question as UNE Issue 57, and for the reasons described under that issue the Commission adopts SBC's proposal.

SBC's proposal for Section 14.1.4.4 relates to the bona fide request process, which is discussed in UNE Issue 59. For the reasons set forth under UNE Issue 59, the Commission finds in favor of SBC.

UNE ISSUE 59: **WHEN MCI REQUESTS CUSTOMIZED ROUTING OUTSIDE OF THE NORMAL ROUTING CONDITIONS THAT SBC PROVIDES (*I.E.*, FEATURE GROUP D), MUST MCI SUBMIT A BFR?**

ICA Reference: UNE § 14.1.5.1

MCI proposes language for Section 14.1.5.1 that would require SBC to develop customized routing over Feature Group D at no cost to MCI. SBC, on the other hand, proposes language that provides that the development of new capabilities (such as customized routing over Feature Group D) must be requested through the BFR process. The Commission adopts SBC's proposal, consistent with its decision in the AT&T Arbitration (Docket 03-0239, at 86-89) and with the FCC's decision in the *Louisiana 271 Order*, 13 F.C.C. Rcd. 20599 (1998) ¶ 220. Further, the Commission notes, MCI's position is fundamentally unfair. If MCI wants SBC to spend time, effort and money to investigate and develop a new capability, then it should agree up front to pay for those costs. MCI's proposal suggests that it wants SBC to bear the entire costs of developing products for MCI's use. In addition, the BFR process is the only defined method that

allows MCI to communicate engineering and operational needs associated with the request, and that allows SBC to make the appropriate assumptions when it develops the new capability.

UNE ISSUE 61: **IF MCI EXCEEDS THE CAP ON DEDICATED DS3 TRANSPORT, WHAT PROCEDURES SHOULD APPLY?**

ICA Reference: UNE § 15.4

Alternative 1

As with the two-DS3 cap on loops (discussed under UNE Issue 33), the *TRO* established a cap for dedicated transport. The FCC "establish[ed] a maximum number of twelve unbundled DS3 transport circuits that a competing carrier or its affiliates may obtain along a single route." *TRO* ¶ 388; see also 47 C.F.R. § 51.319(e)(2)(iii). The issue here dealt with how the ICA should carry out the FCC cap. As explained in Section I, however, the Commission has decided that the ICA should not include any language regarding the unbundling of DS3 dedicated transport in any quantity. Accordingly, Section 15 should be deleted and UNE Issue 61 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed language. As with Issue 33, MCI agrees that SBC may reject outright an order that exceeds the FCC cap. MCI's complaint is that SBC should not accept the order and price the extra DS3s at access rates. As with Issue 33, if MCI really does not want to pay access prices, the solution is simple: MCI should not place an order for more than its share of DS3s.

UNE ISSUE 62: **SHOULD THE PRICES FOR NETWORK RECONFIGURATION SERVICE BE INCLUDED IN APPENDIX PRICING OR OUTLINED IN SBC ILLINOIS' TARIFF?**

ICA Reference: UNE § 15.9.1

Alternative 1

UNE Issue 62 concerns terms and conditions for unbundled dedicated transport. As explained in Section I, federal law precludes the inclusion of any terms and conditions for unbundling Dedicated Transport. Accordingly, MCI's Section 15 should be deleted and UNE Issue 62 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts the language proposed by SBC for Section 15.9.1 of the UNE Appendix. Network reconfiguration service ("NRS") is a service that enables a CLEC to remotely reconfigure its dedicated transport to better reflect the CLEC's traffic patterns. Section 15.9.1 provides that SBC will offer NRS as part of the unbundled dedicated transport element with the same functionality that is offered to interexchange carriers. Because it is an access offering, SBC's proposed language for 15.9.1 provides that charges for reconfiguration

service are those outlined in SBC's federal access tariff. MCI, on the other hand, proposes that the charges for NRS be based on TELRIC. The Commission rejects MCI's proposal because NRS is not a UNE and has never been one.

UNE ISSUE 63: **WHICH PARTY'S REQUIREMENTS FOR ROUTINE NETWORK MODIFICATIONS WITH RESPECT TO DEDICATED TRANSPORT SHOULD BE INCLUDED IN THIS AGREEMENT?**

ICA Reference: UNE § 15.11 *et seq.*

Alternative 1

UNE Issue 63 concerns terms and conditions for unbundled Dedicated Transport. As explained in Section I, the Commission has held that federal law precludes the inclusion of any terms and conditions for unbundling Dedicated Transport. Accordingly, MCI's Section 15 should be deleted and UNE Issue 63 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed language governing routine network modifications for dedicated transport, as set forth in Section 15.11, 15.11.1, 15.11.2, 15.11.3, and 15.11.4 of the UNE Appendix. SBC's proposed language is very similar to the language proposed by SBC for Sections 9.71, 9.72 and 9.73 of the UNE Appendix which governs routine network modifications for UNE loops. The only difference is that the routine network modifications language proposed by SBC for loops tracks the FCC rule specific to loops (47 C.F.R. § 51.319(a)(8)(ii)), while SBC's proposed language for dedicated transport tracks the FCC's routine network modifications rule specific to transport (47 C.F.R. § 51.319(e)(5)(ii)). The Commission accordingly adopts SBC's proposed language for Sections 15.11 through 15.11.4, and rejects MCI's language, for the reasons discussed in connection with UNE Issue 34.

UNE ISSUE 64: **SHOULD SBC'S TERMS AND CONDITIONS FOR CROSS-CONNECTS BE INCLUDED IN THE AGREEMENT?**

ICA Reference: UNE § 19 *et seq.*

SBC's proposed Sections 19.2 through 19.8.2 identify the cross-connects available to MCI and the terms and conditions under which those cross-connects will be made available. MCI objects to SBC's proposed language for Section 19 on the grounds that the language in Section 4 of the UNE Appendix (which describes methods for accessing UNE) is sufficient to handle cross-connects.

The Commission rejects MCI's position. Section 4 simply describes the optional connection methods under which SBC agrees to provide with access to loops, switch ports, and dedicated transport to the extent such access is required by federal law. While Section 4 does point out that cross-connects will be required for each of the access methods described in that section, it does not describe the actual cross-connection elements. Without the level of detail SBC proposes in Section 19, MCI will not have an understanding of what cross-connects are

available for ordering or the terms and conditions (other than rates) under which those cross-connects will be provided. The Commission finds unreasonable MCI's claim that it should be able to order whatever type of cross-connects it determines are appropriate, because MCI may not dictate the methods that SBC uses to manage its network.

UNE ISSUE 71: WHICH PARTY'S COMBINATION LANGUAGE SHOULD BE INCLUDED IN THE AGREEMENT?

UNE ISSUE 72: SHOULD SBC BE REQUIRED TO PROVIDE UNE COMBINATIONS WHERE MCIM IS ABLE TO MAKE THE COMBINATION ITSELF, OR OTHER THAN AS SPECIFIED IN THE *TRO*?

ICA References: UNE §§ 2.2.10, 21 (ALL)

UNE Issues 71 and 72 primarily involve a dispute over the parties' competing versions of Section 21 ("Lawful UNE Combinations"). The Commission rejects MCI's proposed version on two grounds. First, unlike SBC's proposed version (which contains general terms and conditions governing SBC's obligations to combine Lawful UNEs without identifying specific UNE combinations), MCI's proposal relates specifically to the provision of existing and new "UNE-P combinations," which include unbundled local switching. Local switching, however, has been "declassified" as a UNE both for enterprise market customers (*TRO*) and for mass market customers (*USTA II*).

The Commission disagrees with MCI's assertion that its proposal is supported by Section 13-801(d)(3) of the PUA. In fact, the Commission has recognized that Section 13-801(d)(3) does *not* require SBC to provide combinations that include network elements which SBC has no legal obligation to provide on an unbundled basis. *Order*, Docket 01-0614 ¶¶ 167, 168 (June 11, 2002).

MCI also argues that its proposed Section 21 because it tracks the language of SBC's UNE-P tariff, which was filed in compliance with the June 11, 2002 Order in Docket 01-0614. The fact that the Commission directed the inclusion of UNE-P combinations in the SBC tariff does not, however, support MCI's position, because the FCC rules requiring ILECs to provide local switching on an unbundled basis were still in effect at the time of that Order. Accordingly, the new UNE-P combinations listed in SBC's tariff were not in conflict with federal law and Section 13-801(d)(3) at the time of the Order. Because the rules requiring the unbundling of local switching have since been eliminated, the provision of combinations that include that element is no longer required by Section 13-801(d)(3) as it was interpreted in Docket 01-0614. Moreover, that docket has been reopened for the purpose of addressing the impact of changes in federal law, including the declassification of unbundled local switching, on both the June 11, 2002 Order and SBC's tariffs. The fact that the reopened proceeding has not yet been completed, and required revisions of the tariffs under review in that docket have not yet been made, does not justify the adoption in this case of contract language that is directly contrary to both federal and state law. Nor does it justify the incorporation of tariff language that is under consideration.

Second, MCI's proposal does not reflect the fact that SBC's obligation to perform functions necessary to create new UNE combinations under the FCC's combinations rule is qualified by the limitations set forth. by the United States Supreme Court in *Verizon Communications, Inc.*, 535 U.S. 467 (2002). As the Seventh Circuit has held, an interconnection agreement that does not contain the additional limitations recognized by the Supreme Court "is inconsistent with the Act as interpreted in *Verizon*, and should be remanded to the [state commission] for reconsideration." *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 391 (7th Cir. 2004) ("*McCarthy*").

UNE Issue 71 also involves MCI's unexplained objection to SBC's proposed Section 2.2.10, which reiterates SBC's obligation under FCC Rule 51.315(b) not to separate MCI-requested combinations of Lawful UNEs, except upon MCI's request. Section 2.2.10 clarifies that SBC is not prohibited from separating non-requested Lawful UNEs (requested by MCI or another telecommunications carrier) in order to provide a Lawful UNE or other SBC offering. The Commission finds this provision to be reasonable, since SBC should not be prohibited from disassembling idle or spare components in its network as needed, to meet customer requests (including CLEC requests) on a day-to-day basis if they are not the subject of a CLEC request. Such a restriction would interfere with efficient inventory, operations, and maintenance and repair of the network. Staff recommended adoption of SBC's proposed Section 2.2.10, subject to a revision to make clear that SBC will not separate UNEs based on its anticipation that MCI will request those UNEs (for example, based on MCI's request for preorder information). SBC has no objection to Staff's proposed version, and the Commission adopts that version.

UNE ISSUE 74: SHOULD THE APPENDIX CONTAIN AN EXAMPLE DESCRIBING HOW AN EEL MUST TERMINATE IN A COLLOCATION ARRANGEMENT?

ICA Reference: UNE § 22.3.1.2.10

Alternative 1

UNE Issue 74 concerns terms and conditions for EELs. As explained in Section I, federal law precludes the inclusion of any terms and conditions for the provision of EELs. Accordingly, MCI's Section 22 should be deleted and UNE Issue 74 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission approves SBC's proposed language for Section 22.3.1.2.10, which describes the collocation requirement for terminating an EEL. Specifically, the language provides that SBC is not required to provide an EEL that does not terminate to a collocation arrangement that meets the requirements of Section 22.3.1.2.8 of the Appendix. SBC's language tracks FCC Rules 51.318(b) and (c).

UNE ISSUE 76: **SHOULD MCI'S DEFINITION OF HIGH CAPACITY EELS BE INCLUDED IN THE AGREEMENT?**

ICA Reference: UNE § 22.1.3

Alternative 1

UNE Issue 76 concerns terms and conditions for EELs. As explained in Section I, federal law precludes the inclusion of any terms and conditions for EELs. Accordingly, MCI's Section 22 should be deleted and UNE Issue 76 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission rejects MCI's proposed Section 22.1.3, which purports to set forth a definition of "high capacity EELs." The Commission adopts the following definition of "high capacity EELs," which more closely tracks the *TRO* (¶ 591):

> High capacity EEL: DS1(1.455 Mbps) or DS3 UNE loops connected to collocated DS1 or DS3 UNE dedicated transport (which may require multiplexing).

MCI's proposed definition of a high capacity EEL goes beyond the FCC's rule and ignores associated requirements. For example, it includes the term "commingled," a term not used in the *TRO*'s definition of a high capacity EEL. Commingling is addressed elsewhere in the UNE Appendix, and the inclusion of that term in the definition of a high capacity EEL is likely to cause confusion. Furthermore, MCI's definition is inappropriate because it does not make reference to the collocation requirement of the FCC's mandatory eligibility criteria in FCC Rule 51.318(b).

UNE ISSUE 77: **SHOULD THE TERMS AND CONDITIONS OF CONVERSION OF WHOLESALE SERVICES TO UNE (SECTION 6) BE REFERENCED IN THE EELS (SECTION 22) OF THIS APPENDIX?**

ICA Reference: UNE § 22.2.1

Alternative 1

UNE Issue 77 concerns terms and conditions for EELs. As explained in Section I, federal law precludes the inclusion of any terms and conditions for EELs. Accordingly, MCI's Section 22 should be deleted and UNE Issue 77 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission approves SBC's proposed introductory phrase for Section 22.2.1, which makes it clear that any request by MCI for the conversion of wholesale services to high capacity EELs must meet the *TRO*'s mandatory eligibility criteria identified elsewhere in Section 22 of the UNE Appendix.

UNE ISSUE 78: **WHICH PARTY'S LANGUAGE BETTER IMPLEMENTS THE EELS SERVICE ELIGIBILITY CRITERIA REQUIREMENTS SET FORTH IN THE SERVICE ELIGIBILITY REQUIREMENTS SET FORTH IN THE *TRIENNIAL REVIEW ORDER*?**

ICA Reference: UNE § 22.3 *et seq.*

Alternative 1

UNE Issue 78 concerns terms and conditions for EELs. As explained in Section I, federal law precludes the inclusion of any terms and conditions for EELs. Accordingly, MCI's Section 22 should be deleted and UNE Issue 78 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission approves the language proposed by SBC for Sections 22.3 *et seq.*, which govern the eligibility requirements for high capacity EELs. SBC's language spells out the mandatory eligibility criteria established in the *TRO*, as set forth in 47 C.F.R. § 51.318. MCI's proposed language for Section 22.3.1, on the other hand, is unduly vague. At a minimum, MCI's language would need to be amended to acknowledge that the mandatory eligibility criteria applicable to requests for high capacity EELs under this agreement are the criteria codified at 47 C.F.R. § 51.318. In the XO Arbitration, the Commission held that the ICA "should either incorporate [47 C.F.R. § 51.318] by reference in its entirety, or spell out all of its provisions in the amended ICA." *Order*, Docket 04-0371 at 35. SBC's proposal complies with the second of these two options while MCI's proposal complies with neither.

UNE ISSUE 79: **WHICH PARTY'S LANGUAGE BETTER IMPLEMENTS THE EELS CERTIFICATION REQUIREMENTS SET FORTH IN THE *TRIENNIAL REVIEW ORDER*?**

ICA Reference: UNE § 22.3.1.2.12

Alternative 1

UNE Issue 79 concerns terms and conditions for EELs. As explained in Section I, federal law precludes the inclusion of any terms and conditions for EELs. Accordingly, MCI's Section 22 should be deleted and UNE Issue 79 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission approves the language proposed by SBC for Section 22.3.1.2.12, which addresses the requirement that MCI certify compliance with the mandatory eligibility requirements applicable to EELs. SBC's proposed language incorporates SBC's established certification process which is used by other CLECs and is similar in form and function to the certification process previously used for similar conversions under the FCC's *Supplemental Order Clarification*. A uniform process that includes a standard form and method of transmittal will help ensure provisioning, maintenance and recordkeeping accuracy. MCI's proposed

language for Section 22.3.1.2.12, on the other hand, would force SBC to develop and administer a certification system unique to MCI. There is no legitimate reason to adopt MCI's proposal when there is already an existing process that can easily be adopted by MCI without causing it any inconvenience.

UNE ISSUE 81: WHICH PARTY'S LANGUAGE BETTER IMPLEMENTS THE EEL'S AUDITING REQUIREMENTS AS SET FORTH IN THE *TRIENNIAL REVIEW ORDER*?

ICA Reference: UNE § 22.5 *et seq.*

Alternative 1

UNE Issue 81 concerns terms and conditions for EELs. As explained in Section I, federal law precludes the inclusion of any terms and conditions for EELs. Accordingly, MCI's Section 22 should be deleted and UNE Issue 81 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed language for Section 22.5, which contains provisions related to audits of EELs for compliance with the minimum eligibility requirements. The Commission finds that SBC's language eliminates some of the potential ambiguity that may give rise to disputes in implementing the *TRO* by clearly establishing the parameters of audits.

UNE ISSUE 82: SHOULD THE CONTRACT CONTAIN A NON-WAIVER CLAUSE WITH RESPECT TO PROVISIONING EELS?

ICA Reference: UNE § 22.6

Alternative 1

UNE Issue 82 concerns terms and conditions for EELs. As explained in Section I, federal law precludes the inclusion of any terms and conditions for EELs. Accordingly, MCI's Section 22 should be deleted and UNE Issue 82 is dismissed as moot.

Alternative 2 (If Alternative 1 Not Adopted)

The Commission adopts SBC's proposed language for Section 22.6, which provides that if MCI does not meet the necessary eligibility requirements for a particular EEL, but SBC provisions the EEL anyway (*e.g.*, due to mistake), SBC shall not be deemed to have waived applicability of the eligibility requirements. MCI did not identify a valid reason for objecting to SBC's proposed Section 22.6. It is possible that SBC may overlook a particular criterion on a particular order by mistake, or may fail to detect that a particular order does not satisfy all of the eligibility criteria. SBC's proposed language is necessary to avoid any contention that such an occurrence means that SBC has intentionally waived the criteria or intentionally agreed that the criteria do not apply. In the absence of such a provision, SBC would have an incentive to propose more rigorous and intrusive procedures than it has proposed to ensure compliance with

the eligibility criteria in order to avoid waiver arguments. Thus, the Commission finds that Section 22.6 is in the interest of MCI as well as SBC.

UNE ISSUE 83: SHOULD SBC'S RESERVATION OF RIGHTS CLAUSE BE INCLUDED IN THIS AGREEMENT?

ICA Reference: UNE § 23

In Section 23 of the UNE Appendix, SBC proposes a reservation of rights clause to protect the parties because unbundling has been (and appears to still be) a dynamic area. The Commission finds that SBC's proposed language is appropriate and clearly defines the rights and responsibilities of the parties with respect to changes of law. SBC's proposal makes clear that neither party is waiving its rights before courts, commissions or legislative bodies just by agreeing to the details in the UNE Appendix. For example, SBC's proposed UNE reservation of rights points to the "necessary and impair" standard in Section 251(d) of the 1996 Act.

In opposing Section 23, MCI incorrectly asserts that it does not allow for the negotiation of an amendment to reflect changes in law. In fact, SBC's proposed language allows the parties 60 days to negotiate an amendment from receipt of a written notice for amendment negotiations. This time limit is reasonable, and it is necessary because MCI might otherwise refuse to negotiate an amendment to its ICA (or unreasonably delay negotiations), especially if the change of law is not favorable to MCI. The Commission finds that SBC's language is necessary to ensure that MCI will engage in good faith negotiations.

xDSL ISSUE 1: SHOULD THE APPENDIX REFLECT THE PARTIES' OBLIGATION TO COMPLY WITH THE *TRO* AND THE LAWFUL AND EFFECTIVE FCC RULES RELATING TO XDSL?

ICA Reference: xDSL § 1.1

The *TRO* requires ILECs to provide unbundled access to copper 2-wire and 4-wire xDSL loops and subloops. *TRO* ¶ 249; 47 C.F.R. § 51.319(a)(1). The parties' Appendix xDSL sets forth the terms and conditions by which SBC will comply with these obligations. SBC proposes that, accordingly, the Appendix xDSL should state (in Section 1.1) that it provides the terms and conditions by which SBC will offer access to unbundled xDSL loops "in accordance with the FCC's Triennial Review Order and associated Lawful and effective implementing rules, as such rules may be modified from time to time." The Commission approves SBC's proposed language.

The Commission finds that MCI's objection to SBC's language is without merit. The portions of the *TRO* and the FCC's rules governing access to xDSL loops constitute applicable law with which both parties must comply. The Appendix xDSL is based on and intended to implement those federal requirements, and its language should explicitly reflect that fact.

The Commission also rejects MCI's suggestion that there are numerous sources of SBC's obligations to provide xDSL to MCI, including FCC regulations other than the TRO, applicable state law and the terms and conditions of the interconnection agreement. MCI has failed to

identify any effective FCC rules that require the unbundling of xDSL loops other than those associated with the *TRO*. And given that the FCC's prior unbundling rules were held unlawful by the D.C. Circuit in *USTA I*, there are no such other FCC rules. Moreover, while MCI refers to state law, it has failed to identify any Commission order requiring SBC to unbundle xDSL loops pursuant to state law. Finally, the terms and conditions of the interconnection agreement are not the source of SBC's obligation to unbundle xDSL loops. Rather, the source of that obligation is the *TRO* and associated FCC rules requiring such unbundling.

xDSL ISSUE 3: SHOULD THE COMMISSION ADOPT SBC'S LIABILITY AND INDEMNITY LANGUAGE FOR THE XDSL APPENDIX IN ADDITION TO THAT CONTAINED IN THE GT&C?

ICA References: xDSL §§ 3.7, 3.8

SBC proposes, and MCI opposes, liability and indemnity contract language directed at the use of non-standard xDSL technologies. The Commission awards this issue to SBC.

Appendix xDSL does not limit either party to the use only of standard xDSL technologies, but allows either party to deploy non-standard xDSL technologies as well. Such non-standard technologies, however, have the potential to cause damage to the network or service disruption or degradation. SBC's proposed language thus appropriately provides that any party (whether SBC or MCI) that chooses to deploy non-standard xDSL technology shall assume the liability for any damages that result from such deployment (with the exception of end-user claims).

The Commission disagrees with MCI's assertion that SBC's proposed language unreasonably imposes liability without any underlying fault. To the contrary, the language imposes liability for damages caused by the deployment of non-standard xDSL technologies upon the party (again, whether SBC or MCI) that causes the deployment of such technology. The Commission finds that if a party elects to deploy a non-standard technology, and the other party suffers damage as a result of that deployment, it would be unreasonable to force the second party to bear responsibility for the damage. Rather, the party that deployed the non-standard technology should bear the responsibility for any damages caused by its choice.

MCI asserts that SBC's proposed language is unnecessary because the parties have agreed to comprehensive liability and indemnity provisions of general applicability in the GT&C. The Commission disagrees. The GT&C indemnity and liability language does not contain any language specifically intended to cover the deployment of non-standard xDSL technologies. Thus, SBC's language is necessary and appropriate.

SBC also proposes contract language (§ 3.7.2) providing that MCI's use of equipment, facilities, or network elements (standard or not) may not "materially interfere with or impair service over any facilities of SBC Illinois . . . , cause damage to SBC's plant, impair the privacy of a communications carried over SBC's facilities or create hazards to employees or the public." If MCI runs afoul of this requirement, SBC shall provide MCI written notice, and MCI will have a "reasonable opportunity to cure" the problem. If MCI does not cure the problem, or

demonstrate that it is not the cause of the problem, SBC may terminate service to the extent necessary to cure the problem – unless MCI contests the basis for the disconnection, in which case the parties "must first submit the matter to dispute resolution."

The Commission finds that these provisions proposed by SBC are reasonable, and should be included in the parties' contract. That language allows SBC to engage in self-help to cure any problem only after providing MCI written notice, an opportunity to cure the problem, an opportunity to contest the matter, and the opportunity to submit the matter to dispute resolution.

Finally, the Commission finds that, contrary to MCI's suggestion, the liability and indemnity provisions of the GT&C do not adequately address these latter issues. The Commission concludes that SBC's language is necessary to adequately address such issues, and thus directs the inclusion of SBC's proposed language in the parties' contract.

xDSL ISSUE 4A: **SHOULD THE TARIFFED TIME AND MATERIAL CHARGES APPLY FOR MAINTENANCE WORK AND TESTING PERFORMED BY SBC ILLINOIS AT MCI'S REQUEST BEYOND THAT REQUIRED UNDER THE ACT OR THE PARTIES' ICA?**

xDSL ISSUE 4B: **SHOULD MCI'S PROPOSED LANGUAGE RELATING TO ACCEPTANCE TESTING BE REJECTED?**

ICA References: xDSL §§ 6.1, 6.5, 7.1, 7.4, 9.3.2, 9.3.2.1, 9.3.6, 9.4.1 (and subsections), 9.4.2, 10.4.2, 10.4.4; Line Sharing §§ 8.2.1, 8.3.3.1, 8.10; Att. YZP § 3.3.3; Att. RABT YZP § 5.1; Att. RABT MMP § 5.1

The record establishes that SBC has developed, on voluntary basis, optional processes for testing and ordering that CLECs can use in connection with their deployment of advanced services. The Commission finds that, because these options go beyond what is required by law, they fall outside the scope of Sections 251(b) and (c), and are therefore not subject to the mandatory negotiation and arbitration provisions of Sections 252(a) and (b). Thus, the Commission rejects MCI's proposal to require changes to the rates, terms, conditions, and processes for these voluntary services. If MCI does not wish to accept SBC's voluntary offer to provide these services on the terms and conditions SBC offers, MCI will not obtain these services from SBC.

The Commission believes that forcing SBC to alter the rates, terms, and conditions at which it has made these voluntary, optional offerings would frustrate the pro-competitive purposes of the 1996 Act and make for poor policy. An ILEC's willingness to develop additional offerings for CLECs beyond those that are required by regulation hinges on the ILEC's ability to charge a particular rate for the voluntary offerings, upon particular terms and conditions. For instance, SBC explained that its optional Acceptance testing process was developed to address specific CLEC requests, and was modified through business-to-business negotiations to meet the data CLECs' requests. SBC was willing to develop and create that new process because parties were able to agree upon rates that SBC found acceptable. If SBC could

charge only artificial TELRIC-based rates for voluntary offerings, and if the other terms and conditions of those offerings were up for grabs in any subsequent arbitration, it would have little incentive to develop and offer new options to CLECs.

A number of these optional processes are at stake in the parties' xDSL issues. Each process is discussed below. (The parties' disputes regarding these processes cut across xDSL Issues 4, 5, 7, and 8, and for the sake of clarity and to conserve space all these issues are addressed on a consolidated basis below.) The Commission finds that, as SBC demonstrated, these processes are not mandatory under Section 251 of the Act, and MCI thus has no right to demand that SBC provide these services at all, much less to demand that SBC alter the rates, terms, and conditions at which it offers these processes. Finally, the Commission explains that, even if the processes at issue were required by Section 251 and were subject to arbitration (which they are not), MCI's proposed language would still be rejected. Thus, the Commission rejects MCI's proposed contract language, and does not direct that any contract language regarding these offerings be included in the parties' agreement. That does not mean MCI will not be able to take advantage of SBC's offerings, however. The Commission notes that SBC has committed to continue to offer these processes to MCI outside of Sections 251/252, via an Optional Advanced Services Attachment to a commercial agreement. MCI may enter into this optional attachment, should it so choose.

Optional testing (including Acceptance Testing and Cooperative Testing). An xDSL capable loop is an unbundled loop that a CLEC can use to provide Digital Subscriber Line ("DSL") service. A CLEC does this by placing special electronics on both ends of the loop that enables the end user to transmit data at speeds up to 1.5 Mpbs. SBC is required to provide xDSL loops as UNEs under Section 251(c)(3) and it does so pursuant to a series of conditions established by the FCC. The record demonstrates that SBC has done more, however. While SBC guarantees the quality of the xDSL loops that it provisions (*i.e.*, that the loop will have continuity and pair balance), and while SBC performs its own testing to assure that this level of quality is met, SBC also offers two options that permits CLECs to request additional testing.

Acceptance Testing may be conducted upon provisioning an xDSL loop to a CLEC. SBC developed this option after CLECs expressed a desire to make use of the SBC technician dispatched to the end user's premise when installing a new xDSL capable loop. This Acceptance Testing process allows the CLEC to conduct testing without paying for a separate dispatch charge or dispatching its own technician. When such testing is requested by a CLEC, SBC's field technician will call its Local Operations Center and the SBC tester will then call a toll free number provided by the CLEC so that the CLEC can initiate a series of acceptance tests. The record establishes that Acceptance Testing is not a necessary step in the delivery of an xDSL loop – the CLEC would receive a fully tested, operating loop without any testing of its own. In those cases, however, where the CLEC wishes to perform an additional test of its own, SBC has offered to assist the CLEC through the Acceptance Testing process.

"Cooperative Testing" is the same as Acceptance Testing except that it is requested by a CLEC in the maintenance phase via a trouble ticket. When such testing is requested, SBC will dispatch a technician to the end user's premise after installation so that the CLEC can perform its own test while the SBC technician places a short on the loop at the premises. In each case, the record establishes that SBC is not performing a test at all. Rather, SBC is assisting the CLEC as

the CLEC performs its own test to verify loop continuity, which SBC already guarantees in the ICA (in xDSL Appendix § 6.1).

MCI claims that Acceptance Testing and Cooperative Testing are "within the scope of SBC's 251(c)(3) obligations because 47 C.F.R. § 51.319(a)(1)(iii) and (iv) require SBC to test xDSL loops provided to MCI." The Commission disagrees. While 47 C.F.R. § 51.319(a)(1)(iii) and (iv) require an ILEC to perform testing and provide physical loop test access points to a CLEC, those rules do not require Acceptance Testing or Cooperative Testing – because those are not tests performed by SBC. The Commission notes that MCI does not disagree with SBC's technical description of the activities involved in Acceptance testing and Cooperating testing. That is, MCI does not disagree that under these processes MCI is performing tests, with SBC's assistance.

Acceptance testing (xDSL Appendix, § 9), for instance, is not part of the standard testing performed by SBC in provisioning an xDSL loop, and indeed is not performed by SBC at all. Rather, it is performed by MCI with SBC's assistance, while SBC's technician is at the end user's premise after installing an xDSL loop. The process allows a CLEC to avoid dispatching its own technician, and to make use of SBC's technician while that technician is already dispatched to a premise, without paying for a separate dispatch charge. Similarly, the record establishes that Cooperative Testing (xDSL Appendix, § 10) is not part of the provisioning process, and is not performed by SBC. Rather, Cooperating Testing allows a CLEC to request that SBC dispatch a technician to the end user's premises after installation is complete so that the *CLEC* can perform its own tests while the SBC technician places a short on the loop at the premise. Such testing has never been required under any FCC rules or orders, but has been voluntarily offered by SBC, with the proviso that SBC receive market-based, tariffed time and material rates for performing these activities.

In short, while the FCC's rules require ILECs to perform certain testing, those rules do not require SBC to dispatch a technician to assist a CLEC with performing the CLEC's own testing. Moreover, MCI is capable of dispatching its own technician to the end user's premises to perform its own testing. Thus, the Commission concludes that in each of the optional processes described above, SBC has exceeded its obligations under Section 251(c) by going above and beyond the minimum requirement to provision xDSL loops. It has, in fact, developed mutually beneficial procedures – but has done so on a voluntary basis and in a way that falls outside the scope of mandatory arbitrability under Section 252.

In xDSL Issues 4, 7 and 8, MCI proposes to reduce the price that SBC would be allowed to charge for these optional testing processes. In particular, MCI argues that SBC should perform these functions at rates set forth in the Price List rather than at SBC's tariffed labor rates. And in xDSL Issue 5, MCI seeks to change SBC's voluntary optional testing process by requiring a special provisioning standard which, if not met, would exempt MCI from any optional testing charges for 60 days. xDSL Appendix § 9.4.1. The Commission rejects MCI's proposals because, as explained above, these optional testing processes fall outside the scope of Section 251/252 – and thus MCI is not entitled to different terms than those upon which SBC voluntary offers these processes.

Finally, even if MCI were correct that additional testing such as Acceptance Testing and Cooperative Testing were required under the 1996 Act, the Commission would reject MCI's proposed language. MCI proposes that Acceptance Testing be billed at the applicable rates as set forth in Appendix Pricing, and that Cooperative Testing be billed as set forth in Appendix Pricing. In Appendix Pricing, however, MCI proposes a charge of $0.00 for Acceptance Testing and Cooperative Testing. It would clearly violate the 1996 Act's and the FCC's TELRIC cost-based pricing requirements to require SBC to perform these activities for free. SBC, on the other hand, proposes to apply the long-established time and material charges found in its FCC Tariff No. 2. In the recent AT&T arbitration, the Commission approved application of those charges in instances where SBC performed work not covered by SBC's standard non-recurring charges. Arbitration Decision, Docket No. 03-0239, at 107. The Commission would reach the same result here, if these issues were subject to arbitration here.

Similarly, with respect to xDSL Issue 5, the Commission would again reject MCI's proposed language even if the issue were subject to arbitration. MCI seeks to change SBC's voluntary optional testing process by requiring a special provisioning standard which, if not met, would exempt MCI from any optional testing charges for 60 days. SBC explains that it is true that SBC originally offered acceptance testing in Texas in this manner when the xDSL loop offering was first rolled out. That is because at that time, the lack of any testing option and the lack of established performance measures for these offerings prompted SBC Texas to enter into this arrangement. Now, however, xDSL loop provisioning methods are well established and SBC's performance is closely monitored through a number of performance measures. Thus, the Commission concludes, there is no need or justification for MCI's proposed provision, which could serve only to provide a windfall for MCI.

Non-working hours loop conditioning and additional CLEC-requested maintenance. MCI's proposed Section 6.5 of Appendix xDSL concerns the charges that apply for loop conditioning during non-working hours, and MCI's proposed Section 7.1 concerns the charges for additional maintenance activities. MCI claims that SBC is obligated under Section 251(c)(3) and the FCC's rules to provide loop conditioning and maintenance and repair of xDSL loops. That may be true, but it is not the issue here. With respect to loop conditioning, the issue here concerns the charges that apply when MCI requests that SBC perform conditioning during non-working hours. MCI points to nothing in the 1996 Act or the FCC's regulations that requires an ILEC to perform conditioning during non-working hours. Thus, the Commission rejects MCI's assertion that SBC is obligated to perform the relevant activities under the 1996 Act.

Similarly, the agreed contract language already provides that SBC will perform maintenance to assure loop continuity and balance, and, for loops that MCI has had conditioned, will verify continuity, the completion of all requested Conditioning, and will repair at no charge to MCIm any gross defects which would be unacceptable based on current POTS design criteria. xDSL Appendix, § 7.1. The issue here concerns the charges that should apply to additional maintenance requested by MCI. The Commission notes that all 47 C.F.R. § 51.319(a)(1)(iii) and (iv) say about maintenance is that the ILEC shall provide the CLEC physical loop test access points for the purpose of testing, maintaining, and repairing copper loops and copper subloops. Those rules say nothing about performing additional, non-standard maintenance activities at a CLEC's request.

Even if MCI were correct that these additional conditioning and maintenance activities were required by the FCC's rules and subject to arbitration, the Commission would still reject MCI's proposed language. SBC's language provides that SBC will perform these activities at the approved time and material charges found in SBC's FCC Tariff No. 2. MCI, on the other hand, has not explained how its proposed labor rates were developed, or where they come from. MCI's proposed labor rates appear lower than SBC's standard hourly technician labor costs and are unsupported by any cost study.

Optional Ordering Processes: "Yellow Zone Process" and "RABT using the Yellow Zone Process." The "Yellow-Zone Process" ("YZP") is another optional process (this one for ordering) that goes above and beyond the standard process. Under the standard process, a CLEC orders xDSL (or line-shared) loops with line conditioning, and SBC removes equipment on the loop that can interfere with xDSL transmission – such as bridged tap and load coils – and charges the CLEC accordingly. Under the YZP, the CLEC can order an xDSL loop "as is" with no conditioning and then, after the loop is provisioned, the CLEC may request any desired loop conditioning. The YZP permits a CLEC to operate more economically because, under this option, it does not need to order conditioning on an xDSL loop unless and until it determines it actually needs it.

"RABT" means "remove all bridged tap." A bridged tap is essentially a splice into the loop from which another end user can be served. As a general matter, xDSL can operate on loops with bridged taps of less than 2500 feet. SBC's removal of all bridged tap product offerings under the yellow zone process ("RABT-YZP") is available only to CLECs that order xDSL or line shared loops via SBC's YZP process and simply allows a CLEC to request loop conditioning beyond that called for by applicable industry standards (*i.e.*, the removal of all bridged tap). In other words, with RABT-YZP a CLEC can obtain conditioning beyond that called for by industry standards via a trouble ticket.

These optional ordering processes fall outside the scope of Section 251/252 – and thus MCI is not entitled to different terms than those upon which SBC voluntary offers these processes.

MCI points out that SBC's affiliates can utilize the YZP process, and suggests that SBC's position that YZP is a voluntary offering seems to be an attempt to end-run the FCC's nondiscrimination rules. The Commission disagrees. SBC demonstrated that it is offering MCI the same voluntary YZP offering that it offers its affiliates, and will continue to offer YZP to MCI as long as SBC's affiliates are offered that option. Moreover, the Commission finds that MCI's reference to nondiscrimination requirements is inapt – MCI is not seeking access to the same YZP process that SBC offers its affiliates (which is precisely what SBC has already offered MCI), but is seeking to arbitrate different rates, terms, and conditions for the YZP process, which would apply only to MCI, and only in Illinois.

Finally, even if MCI were correct that the additional YZP ordering processes were required by the FCC's rules and subject to arbitration, the Commission would reject MCI's proposed language. xDSL Issues 4, 7 and 8 involve MCI's attempt to change the optional YZP and "RABT using YZP" processes. For example, in xDSL Issue 8, MCI requests the ability to "place YZP orders via the ICA's regular ordering provision." As SBC demonstrated, YZP

orders are submitted through a separate "YZP process." MCI, in essence, seeks to change the YZP process to require SBC to develop a brand new process that applies only to MCI in Illinois. That, the Commission concludes, would undermine the very efficiencies that SBC believed it could obtain by offering the voluntary YZP arrangement on a 13-state basis. MCI has not provided any evidence that requiring such changes to SBC's established processes is reasonable or necessary. The record establishes that the YZP process and the standard trouble ticket process are fundamentally different, and cannot be used interchangeably. For instance, the standard trouble ticket process is designed to handle actual cases of trouble, while the YZP process is not, but allows a CLEC to request conditioning even if the loop is operating as designed. To implement MCI's proposed modifications to the YZP process, SBC would have to develop a new YZP process to apply to MCI, and only in Illinois; to retrain its personnel on the different processes; to develop a mechanism to inform its field personnel which CLECs' orders should be handled under the normal process and which under the new MCI process; and to examine each and every YZP request to determine which procedure should apply. The Commission concludes that MCI's proposal would be inefficient, create unnecessary work, introduce increased costs, and increase the likelihood of mistakes.

In xDSL Issues 4, 7 and 8, MCI proposes lower rates than those included in SBC's voluntary YZP and "RABT using YZP" offers. MCI, however, has failed to provide any support for its proposed rates. Moreover, the parties' competing language addresses the rates that apply when MCI submits unnecessary trouble tickets – that is, when MCI submits a trouble ticket in connection with the YZP or RABT-YZP ordering processes, but no trouble is found in SBC's network, or there is no bridged tap, or a vendor meet is scheduled and MCI's technician does not show up or shows up unprepared. As we explain below, SBC's tariffed (FCC Tariff No. 2) time and material charges should apply in such circumstances, and the labor rates proposed by MCI are rejected.

MCI also objects to language specifying the circumstances where time and material charges shall apply. Sections 3.3.3.1 through 3.3.3.4. As Staff explained, in each of these circumstances, MCI requests that SBC perform work, and that work proves to be either not needed or cannot be accomplished, due to non-performance by MCI. The Commission agrees with Staff and SBC that MCI's objection to these provisions is without merit. In each of these situations, SBC incurs at least the expenses of the technician's hourly wage and the transportation necessary to get the technician to the reported trouble, and if MCI's non-performance results in SBC Illinois incurring unnecessary expense, it appears appropriate for MCI to compensate SBC Illinois for its expenses incurred. Moreover, including this language in the interconnection agreement will have the benefit of reducing misunderstandings between the two parties, because both parties will better understand their rights and responsibilities in this relationship. Thus, if this issue were subject to arbitration, the Commission would still approve SBC's language, and reject MCI's.

Unnecessary trouble tickets. MCI and SBC agree that where one party opens a trouble ticket, but the trouble is ultimately found in that party's own equipment, that party should compensate the second party via time and material charges for the time and effort the second party unnecessarily expended in responding to the trouble ticket. The parties disagree, however, regarding what time and material charges should apply. SBC proposes to apply the time and material charges set forth in SBC's FCC No. 2 tariff, while MCI proposes to include time and

material rates in the Appendix Pricing. Consistent with the Commission's decision in the AT&T arbitration, the Commission awards this issue to SBC.

The time and material charges in SBC's FCC Tariff No. 2 have applied to work performed by SBC on a time and material basis for some time. Indeed, in the recent AT&T arbitration, the Commission expressly approved application of the labor rates contained in the FCC No. 2 tariff in those instances where SBC certain performed work not covered by SBC's standard non-recurring charges. Arbitration Decision, Docket No. 03-0239, at 107.

MCI, on the other hand, has not provided any support for the time and material rates it proposes. MCI has not explained how its proposed labor rates were developed, or where they come from. MCI's proposed labor rates appear lower than SBC's standard hourly technician labor costs (*see, e.g.,* Docket No. 02-0864), and are unsupported by any cost study.

xDSL ISSUE 5: **SHOULD THERE BE AN EXCEPTION TO MCI'S OBLIGATION TO PAY FOR ACCEPTANCE TESTING WHEN CERTAIN PERFORMANCE STANDARDS ARE NOT MET?**

ICA References: xDSL §§ 9.3.6, 9.4.1, 9.4.2

The Commission rejects MCI's proposed language on this issue. As the Commission explains under xDSL Issue 4, Acceptance Testing, which is testing performed by MCI with voluntary assistance from an SBC technician, is not required by the 1996 Act or the FCC's rules and is not subject to arbitration. MCI thus is not entitled to arbitrate this issue, or to demand that SBC modify the rates, terms, and conditions upon which it has voluntarily offered to perform Acceptance Testing. Moreover, as the Commission also explains in its discussion of xDSL Issue 4, even if this issue were subject to arbitration, the Commission would reject MCI's proposed language, and adopt SBC's.

xDSL ISSUE 6: **SHOULD SBC'S ADDITIONAL INTERVENING LAW PROVISION BE INCLUDED IN THE XDSL APPENDIX?**

ICA Reference: xDSL § 14

The Commission awards this issue to SBC, for all the reasons explained in the Commission's discussion of Line Splitting Issue 10.

xDSL ISSUE 7A: **SHOULD THE TARIFFED TIME AND MATERIAL CHARGES APPLY FOR MAINTENANCE WORK AND TESTING PERFORMED BY SBC ILLINOIS AT MCI'S REQUEST BEYOND THAT REQUIRED UNDER THE ACT OR THE PARTIES' ICA?**

xDSL ISSUE 7B: **SHOULD MCI'S PROPOSED LANGUAGE RELATING TO ACCEPTANCE TESTING BE REJECTED?**

ICA Reference: See xDSL Issue 4 above

7(a) and 7(b). The Commission rejects MCI's proposed language on these issues. As we explain under xDSL Issue 4, the testing and maintenance activities at issue are not required by the 1996 Act or the FCC's rules, and thus are not subject to arbitration. MCI thus has no right to arbitrate this issue, or to demand that SBC modify the rates, terms, and conditions upon which it has voluntarily offered to perform these activities. Moreover, as the Commission also explains in its discussion of xDSL Issue 4, even if this issue were subject to arbitration, the Commission would reject MCI's proposed language, and adopt SBC's proposal to apply its tariffed time and material charges (found in SBC's FCC Tariff No. 2) for all optional ordering processes that are not required by the 1996 Act, and that are thus performed by SBC voluntarily.

xDSL ISSUE 8: **SHOULD THE TARIFFED TIME AND MATERIAL CHARGES APPLY FOR MAINTENANCE WORK AND TESTING PERFORMED BY SBC ILLINOIS AT MCI'S REQUEST BEYOND THAT REQUIRED UNDER THE ACT OR THE PARTIES' ICA?**

ICA References: YZP §§ 3.3.3 *et seq.*, 5.1; RABT-YZP § 5.1

The Commission rejects MCI's proposed language on this issue. As the Commission explains under xDSL Issue 4, the testing and maintenance activities at issue are not required by the 1996 Act or the FCC's rules, and thus are not subject to arbitration. MCI thus is not entitled to arbitrate this issue, or to demand that SBC modify the rates, terms, and conditions upon which it has voluntarily offered to perform these activities. Moreover, as the Commission also explains in its discussion of xDSL Issue 4, even if this issue were subject to arbitration, the Commission would reject MCI's proposed language, and adopt SBC's proposal to apply its tariffed time and material charges (found in SBC's FCC Tariff No. 2) for all optional ordering processes that are not required by the 1996 Act, and that are thus performed by SBC voluntarily.

Dated: October 1, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dennis G. Friedman, an attorney, hereby certify that I caused a copy of the foregoing SBC ILLINOIS' SUBMISSION OF PROPOSED COMMISSION CONCLUSIONS to be served on the following parties via email on the 1st day of October, 2004.

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