STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Level 3 Communications, L.L.C.	)	
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	)	**04 - 0428**
Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws For Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois)	)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S POSITION STATEMENT

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to the Administrative Law Judge's ("ALJ") directive, provides the ALJ with the following Position Statement, as set forth below.

I. STAFF'S POSITION STATEMENT

Issues GT&C 6 & 7

GT&C Issues 6 and 7 address the issue of disconnection of services for nonpayment of undisputed charges between the parties. The Staff recommends that the Commission accept SBC's position, modified to accommodate certain concerns of Level 3 regarding the services that could be disconnected in an instance when Level 3 either fails or refuses to pay an undisputed amount. Staff Ex. 2.0 (Omoniyi), at 11. The Staff further recommends SBC should have the right to disconnect service, but with some well-defined guidelines for such a bill collection processes. *Id.*, at 11-12. The Staff recommends that the collection process should include at least the following two steps:

1. SBC should provide Level 3 adequate notice in writing regarding the bill in question by forwarding the bill to an appropriate official designated by Level 3. Currently, SBC proposed sending two notices of disconnection for undisputed and unpaid charges but without specifying when it would be done. SBC should clarify how those notices would be sent to Level 3 and the applicable time interval for each notice.

2. SBC's notice to Level 3 should contain a specific deadline for disconnection of service to Level 3 if payment, in a specified amount, is not forthcoming, and should identify the service(s) that SBC will disconnect. *Id*; Staff IB at 4-5.

The Staff recommends creating a disconnection process that is a blend of the parties' positions, for the following reasons. Staff Ex. 2.0 (Omoniyi), at 12. First, SBC's concern that Level 3 should either dispute a bill or pay it is a reasonable request. *Id*. There is nothing unusual about such a position and it is a common commercial practice that payment would be made for services, unless the paying party disputes the bill. Second, SBC indicated that there would be no disconnection of service in the event that a bill is disputed. *Id*., at 12-13. A third reason is Level 3's concern that SBC may simply disconnect any or all service to Level 3's end users. *Id*., at 13. SBC's proposal ultimately seems to grant SBC the unilateral authority to decide which services of Level 3 that could be subject to disconnection in the event of nonpayment. The Staff recommends that SBC should not be allowed to disconnect any and all services; in particular, SBC should not disconnect those services paid by Level 3. A result contrary to this recommendation is likely to engender confusion between the parties and also severely affect Level 3 end-users (or end users of those carriers to which Level 3 might sell services), who have nothing to do with the bill payment problem between the two carriers. *Id*. Thus, the public interest in maintaining uninterrupted service to end-users should take precedence in the consideration of this issue. Staff IB at 5-6.

On the other hand, an equally important concern for the Staff is SBC's fear that Level 3 could avoid payment and disconnection in perpetuity. Staff Ex. 2.0 (Omoniyi), at 13. This could occur if Level 3, for example, moves its UNE lines that are not paid for, to resale service. This potential problem could be addressed by specifically forestalling migration of services that are not paid for to paid-for services. Id., at 13-14. For example, SBC should be able to bar Level 3 from moving its UNE lines that are not paid for to resale. *Id*., at 14. This proposal should be more than adequate to address any attempt by a CLEC, or Level 3 in the instant case, to engage in evasive practices in which undisputed bills are not paid and yet SBC would be unable to disconnect such services of Level 3. Therefore, rather than allow large-scale and generalized disconnection of service, which could affect both paid and unpaid services of Level 3, a targeted solution which affects only the unpaid services is a better solution. Staff IB at 6.

The Staff recommends that SBC's proposal regarding the right to disconnect for products and services after two written notices have been given to Level 3 should be adopted. Staff Ex. 2.0 (Omoniyi), at 14. The Staff also recommends that the word "shall" as proposed by SBC should be adopted to provide both parties certainty on the consequences of undisputed charges. *Id*. In contrast, any provision that states that the disconnection "may" be undertaken for undisputed bill would likely lead to confusion and disagreement on the issue of when, how and what disconnection should be done between the parties. Finally, Level 3's concern that it should not lose its entire customer base as a result of SBC's unilateral and potentially arbitrary disconnection is valid and should be taken into account. *Id*., at 15. Therefore, the Staff recommends that any

disconnection be specific and limited in scope to the products and services for which Level 3 has not paid and has not disputed the charges, after two reasonable written notices from SBC at well-defined intervals. Staff IB at 7.

Issues PC-1 and VC-1

The issues in both PC-1 (Terms and Conditions Governing Physical Collocation) and VC-1 (Terms and Conditions Governing Virtual Collocation) are identical. According to the parties, the issue is whether the relevant Physical Collocation Appendix and Virtual Collocation Appendices should comprise the sole and exclusive terms and conditions governing physical and virtual collocation, respectively; or whether Level 3 should be permitted to order collocation products and services both from the relevant Appendix and from the existing state tariff.[1] In essence, should Level 3 be allowed, "to 'pick and choose' rates, terms and conditions from either its interconnection agreement with SBC, or from a state tariffs"?[2]

The Staff recommends that the Commission adopt SBC's proposals with some modifications to address certain Level 3 concerns. Staff Ex. 2.0 (Omoniyi), at 20. The Staff's recommendation is based on the following two reasons. First, SBC's proposal that "starting on the Effective Date of this Agreement," SBC will honor "any existing Section 251(c)(6) physical collocation arrangements that were provided under tariff prior to the effective date at the prices that apply under this Agreement." Thus, Level 3's concerns regarding its ability to "pick and choose" are overstated; its ability to pick and choose existing rates, terms and conditions is already available and included under SBC's proposed language. Staff IB at 8.

Second, these parties seem to focus their attention in part on an issue that does not apply to the arbitration of an interconnection agreement. Staff Ex. 2.0 (Omoniyi), at 20. Section 252(i) of the Telecommunications Act of 1996 ("TA 96") appears to apply only to situations where a CLEC wants to adopt an existing interconnection agreement under which another CLEC currently operates, the so-called, "opt-in rule." *Id*. Level 3's proposal does not appear to be an opt-in situation; rather, the issue is whether Level 3 should be allowed to buy from the state tariff after this interconnection agreement has become effective, in spite of the fact that Level 3 has an existing interconnection agreement, the terms and conditions of which govern the purchase of the services it seeks to purchase under the tariff. *Id*. Although SBC termed this as a "pick-and-choose" situation, this is a misnomer. However, it appears the parties do not address a situation where the rates, terms and conditions of this Agreement may be superseded by an SBC tariff. Neither the contract provisions proposed by SBC or Level 3 contemplate this occurrence. Since they do not address this issue, the Staff recommends that SBC and Level 3 should only be permitted to order from an effective SBC tariff if the instant agreement does not address the products or services Level 3

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[1] See Level 3-SBC 13 State –DPL – Physical Collocation, PC-1, at 1-2. and Level 3-SBC State – DPL- Virtual Collocation, VC-1, at 1-2.

[2] SBC Ex. 5.0 at 3.

seeks to purchase out of the tariff. *Id*. This should satisfy SBC's concern that the Level 3 proposal could lead to administrative confusion and burden SBC's business. Staff IB at 8-9.

Issues PC-2 and VC-2

The issue in both PC-2 and VC-2 are identical. According to the parties, the issue is whether Level 3 should be permitted to collocate equipment that SBC has determined is not "necessary for interconnection or access to UNEs" or does not meet minimum safety standards?[3] In this instance, the parties were referring to the term "necessary for interconnection or access to UNEs" as used in Section 251(c)(6).

The Staff recommends that SBC's proposals be adopted, with some modifications to address certain Level 3 concerns, for the following reasons.[4] Staff Ex. 2.0 (Omoniyi), at 25. First, the issue of placement of collocation equipment requires that the parties take into account the safety of not only the equipment of Level 3 and SBC, but also the safety of the entire network, which includes the equipment of all carriers. It is also a public interest issue as any threat to the network threatens service to all the end users. *Id*., at 26. Accordingly, the Staff finds it reasonable to turn down collocation requests for equipment that fail to meet the minimum safety standards. Staff IB at 9-10.

Second, a period of ten (10) business days, which SBC proposes, seems to be a reasonable notice period to resolve any issues of equipment collocation. Staff Ex. 2.0 (Omoniyi), at 26. Also, it appears that Level 3 has an additional means of collocation dispute resolution, as it may appeal to the Commission if any discussion between SBC and Level 3 fails to resolve the dispute. See the General Dispute Resolution provisions of General Terms and Conditions, Section 10. Thus, this provision should help eliminate any Level 3 concerns that a dispute could remain in limbo for an extended period of time. Staff IB at 10.

Third, the proposal by SBC that Level 3 should incur the cost of removal and resulting damages if the non-compliant equipment was already collocated is reasonable as it would be unfair to require SBC to bear the cost of such removal and any resulting damage. Staff Ex. 2.0 (Omoniyi), at 27. Finally, in order to avoid this type of problem in the first place, SBC should make its list of equipment that meets its collocation requirements known to Level 3 as soon as there is a request for collocation of equipment from Level 3. *Id*. This would save both parties time in either avoiding the placement of non-compliant equipment in a collocation cage or resolution of any disagreement prior to collocation of non-compliant equipment by error. *Id.* This step is

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[3] See Level 3-SBC 13 State –DPL – Physical Collocation, PC-2, at 2-3 and Level 3-SBC State – DPL- Virtual Collocation, VC-2, at 2-3.

[4] The Staff notes that the parties did not address the term of art "necessary" but instead focused on the issue of equipment safety. The Staff's recommendation, consequently, will address the issue of equipment and how that should be the focus of whether a collocation equipment should be allowed or not.

also in the public interest as it is likely to prevent damages to the entire network that may affect other carriers in the entire network. Staff IB at 10.

Issue IC – 1

The Appendix Intercarrier Compensation "sets forth the terms and conditions for Intercarrier Compensation of intercarrier telecommunications traffic between" SBC and Level 3.[5] The parties offer competing proposals to classify traffic [as if "jurisdictionally"] for purposes of intercarrier compensation. Staff IB at 11.

The utility of these classifications, according to the Staff, will depend on how well the distinctions in traffic established in these classifications match the distinctions in compensation levels appropriate for the respective traffic types. Level 3's proposed classifications do not closely track distinctions in intercarrier compensation that have been identified in the agreed language between the parties or in Commission or FCC rules, regulations, or decisions. Accordingly, the Staff recommends the Commission reject them. *Id*.

SBC, however, offers classifications based upon traffic definitions contained in agreed language between the parties and various Commission and FCC intercarrier compensation orders. In the Appendix Intercarrier Compensation, the parties have agreed to identify for separate intercarrier compensation treatment, the following categories of intercarrier traffic: Optional EAS Traffic[6], IntraLATA Toll Traffic,[7] and Meet Point Billing Traffic.[8] In addition, the FCC and Commission have intercarrier compensation rules and regulations, or have made determinations regarding intercarrier compensation, that result in separate intercarrier compensation rates for Section 251(b)(5) traffic[9], FX Traffic,[10] ISP-bound traffic,[11] and interLATA toll traffic,[12]

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[5] Appendix Intercarrier Compensation, Section 1.1.

[6] Appendix Intercarrier Compensation, Section 8.

[7] Appendix Intercarrier Compensation, Section 14.

[8] Appendix Intercarrier Compensation, Section 12.

[9] 47 C.F.R. § 51, Subpart H - Reciprocal Compensation for Transport and Termination of Telecommunications Traffic; *Order on Remand and Report and Order*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131, CC Docket No. 96-98; 99-68 (April 27, 2001)("ISP Remand Order").

[10] *Arbitration Decision* at 120, 123-4, AT&T Communications of Illinois, Inc. / TCG Illinois and TCG Chicago: Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996, ICC Docket No. 03-0239 (August 26, 2003) (hereafter "AT&T Arbitration Decision")

[11] ISP Remand Order; AT&T Arbitration Decision at 120.

[12] 47 C.F.R. § 69.5; ; see also *Order*, Illinois Commerce Commission On Its Own Motion vs. Illinois Bell Telephone Company; et al., Investigation into Non-Cost Based Access Charge Rate Elements in the Intrastate Access Charges of Incumbent Local Exchange Carriers in Illinois; Illinois Commerce

respectively. Thus, the traffic distinctions proposed by SBC track very closely the distinctions in compensation levels appropriate for the respective traffic types. Staff IB at 11-12.

The Staff finds that SBC's classification proposal does, however, fail to distinguish one form of traffic that is receiving specific and unique treatment under reciprocal compensation rules and regulations from the FCC -- IP-PSTN traffic. On November 9, 2004 the FCC voted "that [it, the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to IP-enabled services."[13] In particular, the FCC specifically indicated that it would address intercarrier compensation as it applies to IP-enabled traffic in its pending IP-enabled services proceeding.[14] Thus, the FCC is addressing reciprocal compensation for IP-enabled services specifically and separately from other types of traffic. Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.1 with one modification. Staff recommends the Commission require the parties to insert one additional classification into this language – an IP-PSTN VoIP traffic classification. This will simply identify that IP-PSTN VoIP traffic is not, at this time, subject to the intercarrier compensation provisions applicable to any of the other classes of traffic in this contract. Of course, adding this class does not prevent the FCC from prescribing intercarrier compensation rules for IP-PSTN VoIP traffic that match intercarrier compensation rules applicable to other proposed SBC classes of traffic, or from determining that existing rules for such traffic apply to IP-PSTN VoIP traffic. Adding this class does, however, permit the FCC to prescribe separate and distinct rules for IP-PSTN VoIP traffic. Thus, with Staff's proposed modification, the distinctions in traffic identified by these classifications will be driven and, more importantly, will not drive differences in compensation levels appropriate for the respective traffic types. Staff IB at 12-13.

Issue IC – 2

The threshold question with respect to Issue IC-2 is whether or not the Commission should, in this arbitration, determine rates, terms, and conditions specifically applicable to the exchange of IP-PSTN "VoIP" traffic. The answer, according to Staff, is unequivocally no. Staff IB, at 13.

Commission On Its Own Motion, Investigation into Implicit Universal Service Subsidies in Intrastate Access Charges and to Investigate how these Subsidies should be Treated in the Future; Illinois Commerce Commission On Its Own Motion, Investigation into the Reasonableness of the LS2 Rate of Illinois Bell Telephone Company, ICC Docket Nos. 97-0601; 97-0602; 97-0516 (Consolidated); 2000 Ill. PUC Lexis 1004 (March 29, 2000) (hereafter "ICC Access Charge Order").

[13] FCC News Release, "FCC Finds That Vonage Not Subject To Patchwork of State Regulations Governing Telephone Companies", (November 9, 2004); found on the World Wide Web at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254112A1.doc.

[14] Id.

The Staff points out that Level 3 has a pending forbearance petition before the FCC that must, according to federal statute, be decided by March 22, 2004.[15] The IP-PSTN issues in this proceeding, including Issue IC-2, require the Commission to determine the proper application of FCC rules and regulations, the same issues placed before the FCC in the pending forbearance petition. Thus, the determinations by the FCC in response to Level 3's petition will determine the IP-PSTN "VoIP" issues presented by the parties to the Commission in this proceeding.[16] And, even if the Commission were inclined to establish rules in the interim, the FCC has preempted it from doing so. Staff IB, at 13.

Staff recommends the Commission affirmatively decide not to resolve IP-PSTN "VoIP" issues in this proceeding. In order to implement this decision Staff recommends that the Commission reject Level 3's proposed language for Appendix Intercarrier Compensation Section 3.2. SBC's proposed language for 16.1 should be accepted, but should revised to specifically indicate that it does not apply to IP-PSTN "VoIP" traffic. If Staff's recommendation regarding this threshold issue is accepted then the Commission would not be required to address any of the subissues presented by Level 3 or SBC within the framing of Issue IC-2. In accepting this recommendation, the Commission should clarify that it is expressly declining to make a determination regarding the rates, terms, and conditions for the exchange of IP-PSTN VoIP traffic in this proceeding. Specifically the Commission should clearly state that the absence of inclusion of IP-PSTN VoIP traffic from any section of the Appendix Intercarrier Compensation means that such traffic is not, because of any arbitration decision made in this proceeding by the Commission, subject to rates, terms, and conditions contained therein. If and when the FCC makes a determination regarding intercarrier compensation for IP-PSTN traffic, the parties can, if appropriate, update the agreement to reflect such determinations. Staff IB, at 13-14.

Issue IC - 3

Here again, the parties offer competing proposals to classify traffic for purposes of intercarrier compensation. Again, as indicated above, according to the Staff the utility of these classifications will depend on how well the distinctions in traffic identified by these classifications match the distinctions in compensation levels appropriate for the respective traffic types. Staff IB, at 14.

In this instance, the fundamental dispute is whether Section 251(b)(5) traffic should be defined according to the geographic location of the calling and called parties, or, alternatively, based upon the calling and called parties phone numbers – in essence whether VNXX or FX-like traffic should be classified separately from Section 251(b)(5)

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[15] Order, ¶ 5, In the Matter of: Petition of Level 3 Communications LLC for Forbearance Under 47 U.S.C. Section 160(c) from Application of Section 251(g) of the Communications Act of 1934, as Amended, the Exception Clause of Section 51.701(b)(1) of the Commission's Rules, and Section 66.5(b) of the Commission's Rules, DA 04-3323, WC Docket No. 03-266 (rel. October 21, 2004).

[16] Staff Exhibit 1.0 at 5-6.

traffic. As Staff noted above, the Commission has consistently distinguished Section 251(b)(5) traffic from VNXX or FX-like traffic.[17] As a classification matter, separately classifying Section 251(b)(5) and VNXX or FX-like traffic does not prevent either the Commission or the FCC from prescribing intercarrier compensation rules for VNXX or FX-like traffic that are similar or identical to intercarrier compensation rules applicable Section 251(b)(5) traffic. Adding this distinction does, however, permit either the Commission or FCC to prescribe separate and distinct rules for VNXX or FX-like and 251(b)(5) traffic. Adding the distinction (along with a specific VNXX or FX-like passage as proposed by SBC with respect to Issue IC-11) identifies -- explicitly rather than implicitly -- the appropriate intercarrier compensation rates applicable to VNXX or FX-like traffic. Staff IB, at 14-15.

Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.2.

Issue IC - 4

With respect to this Issue, Level 3 proposes language that would address proper routing and dispute resolution as its relates to IP-PSTN "VoIP" traffic. The Staff finds that Level 3's recommended language with respect to IP-PSTN "VoIP" traffic should be rejected for the reasons explained in Issue IC – 2.

SBC offers a more generic proposal that would require the parties to work cooperatively to address instances in which traffic is being routed improperly according to the terms of the contract as a result of improper routing to either Level 3 or SBC by a third party. This, according to Staff, would correct, for example, instances in which third parties improperly identify circuit switched interstate interexchange voice traffic delivered to Level 3 and bound for SBC as local traffic rather than switched access traffic. Staff IB, at 15-16.

Level 3's primary objection to this proposal is that it might prohibit the exchange of IP-enabled traffic. However, as explained above, the Staff recommends that Commission not address issues related to IP-PSTN VoIP traffic. Accordingly, Level 3's proposal can be remedied by requiring the parties to include language indicating that the Section 16.2 does not apply to the exchange of IP-PSTN VoIP traffic. Staff IB, at 16.

SBC's proposed language for Appendix Intercarrier Compensation Section 16.2 offers a reasonable approach to general traffic identification problems. Staff, therefore, recommends that SBC's proposed language be accepted, but modified to specify that it does not address IP-PSTN "VoIP" traffic. This recommendation more directly remedies the concerns expressed by Level 3 than does the proposal of Level 3. Id.

Issue IC – 5

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[17] AT&T Arbitration Decision at 123-124.

Here again the parties offer competing proposals to classify traffic for purposes of intercarrier compensation. Again, according to the Staff, the utility of these classifications will depend on how well the distinctions in traffic identified by these classifications match the distinctions in compensation levels appropriate for the respective traffic types. Staff IB, at 16.

In this instance, the Staff finds that the fundamental dispute is whether ISP-bound traffic should be defined according to the geographic location of the calling and called parties rather than based upon the calling and called parties phone numbers – in essence whether VNXX or FX-like ISP-bound traffic should be classified separately from ISP-bound traffic. As observed above, the Commission has distinguished between ISP-bound and VNXX or FX-like ISP-bound traffic.[18] As a classification matter, separately classifying ISP-bound and VNXX or FX-like ISP-bound traffic does not prevent either the Commission or the FCC from proscribing intercarrier compensation rules for VNXX or FX-like ISP-bound traffic that match intercarrier compensation rules applicable to ISP-bound traffic. Adding this distinction does, however, permit either the Commission or FCC to prescribe separate and distinct rules for VNXX or FX-like ISP-bound traffic and ISP-bound traffic. Adding the distinction (along with a specific VNXX or FX-like passage as proposed by SBC with respect to Issue IC-11) also identifies -- explicitly rather than implicitly -- the appropriate intercarrier compensation rates applicable to VNXX or FX-like ISP-bound traffic. Staff IB, at 16-17.

Alternatively, Level 3 offers a definition of ISP-bound traffic that would encompass such traffic as "local" ISP-bound traffic, "VNXX or FX-like" ISP-bound traffic, and interexchange traffic delivered through IXCs bound for an ISP. The Staff finds this classification to be overly broad. For example, it does not reflect differences in traffic that result from differences in intercarrier compensation rates that the Commission has deemed applicable to the respective traffic in past decisions. Staff IB, at 17.

Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.3.

Issue IC – 6

The Staff notes that it is not clear that this is an Illinois issue. Both parties include language that appears responsive to a dispute between Level 3 and SBC in Connecticut. The only disputed language that does not appear Connecticut-specific is contained in the first sentence of Appendix Intercarrier Compensation Section 3.6. With respect to this passage, the parties agree to language that would require the party that originates traffic for an end user to pay the party that terminates the traffic for an end user for transport and termination. The parties disagree on whether this provision should apply to Section 251(b)(5) traffic and ISP-bound traffic as proposed by SBC or to circuit switched traffic as proposed by Level 3. Staff IB, at 17-18.

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[18] Id. at 120.

As with many previous issues, in the Staff's view, resolution of this issue depends on which classification of traffic better reflects differences in intercarrrier compensation treatment for such traffic. In this regard, Level 3's proposal is overly restrictive. For example, the party that originates traffic for an end user must pay the party that terminates the traffic for an end user for transport and termination charges even if the traffic is originated and terminated as a PSTN call, but contains IP routing in the middle.[19] The parties appear to be in agreement on this point. However, Level 3's proposed language, which restricts focus of these provisions to circuit switched traffic, would render such agreed upon provisions inapplicable to IP in the middle circumstances. Staff IB, at 18.

Alternatively, the Staff finds SBC's proposal as potentially overbroad in that it could be read to include IP-PSTN traffic as subject to the requirements of Appendix Intercarrier Compensation, Section 3.6. However, if the Commission accepts Staff's recommendation with respect to Issue IC-1, then IP-PSTN VoIP traffic will be classified separate and apart from 251(b)(5) and ISP-bound traffic. Staff, therefore, recommends that the Commission, conditional on its acceptance of Staff's recommendation for Issue IC-1, accept SBC's proposed language for Appendix Intercarrier Compensation, Section 3.6. Staff IB, at 18-19.

Issue IC – 10

All of the sub-issues raised by the parties with respect to this issue center around the appropriate intercarrier compensation rates for Section 251(b)(5) and ISP-bound traffic. As a threshold matter, the Staff finds that Level 3 appears to question whether intercarrier compensation determinations should be made based upon past agreements between the parties or whether they should be made based upon current FCC intercarrier compensation rules. Staff IB, at 19.

First, Staff notes that Level 3 intimates that it wants the Commission to defer this decision, and indeed, to preempt itself. Level 3 witness William P. Hunt III gives it as his opinion that the entire matter is one that both SBC and Level 3 agree to be beyond Commission jurisdiction. *See* Level 3 Ex. 1.0 (Hunt) at 66 (Both carriers allegedly agree that IP-enabled services are interstate in character). However, Mr. Hunt further contends the Commission should "avoid any major changes to the current compensation regime for ISP bound traffic[.]" Level 3 Ex. 1.0 (Hunt) at 30. This barrier notwithstanding, Level 3 urges the Commission to adopt "the current compensation regime for ISP bound traffic that is in place between Level 3 and SBC", Id. Level 3 does not go so far as to suggest what the current scheme actually is, or upon what, if any, FCC rules or orders it is based. Level 3 intimates that the existing rate structure is .0005¢ per minute of use "for the exchange of all traffic[.]"[20] Id. at 62. This appears to be

[19] See, *Order*, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges FCC No. 04-97, WC Docket No. 03-361(rel. April 21, 2004).

[20] Notwithstanding this, Mr. Hunt states that Level 3 will, when acting as an interexchange carrier, "pay access charges for traditional circuit-switched phone-to-phone InterLATA traffic." Level 3 Ex. 1.0

a reciprocal compensation rate, Id.; Level 3's proposed contract language indicates that the rate should be "$0.0005 per minute of use or at the state approved local compensation rates to terminate IP-enabled services traffic to either Party's end user customer." Joint Disputed Points List, Appendix Intercarrier Compensation Section 3.2.3.1. Staff IB, at 19-20.

The Commission should, according to the Staff, where the FCC has existing and explicitly defined rules governing the compensation of exchanged traffic, make its determinations based on existing intercarrier compensation rules. Staff IB, at 20.

Staff notes that unlike the IP-PSTN VoIP traffic issues addressed above, the FCC has current and effective rules explicitly addressing intercarrier compensation for both Section 251(b)(5) and ISP-bound traffic. These rules are found, among other places, in the Commission's *ISP-Bound Traffic Order*. *See, generally, Order on Remand and Report and Order*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131, CC Docket No. 96-98; 99-68 (April 27, 2001)(hereafter "ISP-Bound Traffic Order" or "ISP Remand Order"). Also, the parties currently exchange Section 251(b)(5) and ISP-bound traffic, which cannot be said for IP-PSTN VoIP traffic. Tr. at 169, 240, and 256. Finally, unlike the IP-PSTN VoIP traffic issues above, the FCC has no statutory deadline for implementing any revisions to its existing rules that might arise from its general intercarrier compensation docket.[21] Thus, unlike the IP-PSTN VoIP issues addressed above the Commission can look to explicit FCC rules for resolution of intercarrier compensation issues regarding Section 251(b)(5) and ISP-bound traffic. Staff IB, at 20-21.

Level 3 objects to SBC's Proposal to use the term "Section 251(b)(5) Traffic" in Appendix Intercarrier Compensation, Section 5, arguing that this term is something SBC created out of whole cloth. Level 3 – SBC 13State – DPL – Intercarrier Compensation, Issue No. IC – 10. It is not, according to Staff. The FCC uses this term repeatedly in *ISP-Bound Traffic Order*. *See* ISP-Bound Traffic Order, ¶¶ 8, 25, 89, 98. Indeed, in the *ISP-Bound Traffic Order*, the FCC abandoned its official definition of "local traffic", citing unnecessary ambiguities created by the term "local traffic", and characterized traffic that is subject to reciprocal compensation under Section 251(b)(5) as "251(b)(5) traffic". ISP-Bound Traffic Order, ¶¶34-41. Thus, in Staff's view, the jurisdictional definition "251(b)(5) traffic" is certainly not a new creation – it finds its origin in the *ISP-Bound Traffic Order*, which establishes the rules governing intercarrier compensation rates for such traffic. In addition, as explained above, traffic subject to Section 251(b)(5) has, for purposes of intercarrier compensation, been treated differently from other types of

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(Hunt) at 45. This rate, approximately $0.0123, is obvious far higher than Level 3's proposal. Staff Ex. 1.0 (Zolnierek) at 11.

[21] Notably, Level 3's expressed expectation that the FCC would replace its existing rules by October 2004 through a new ISP-Bound Traffic Order have not been realized. See DPL – Intercarrier Compensation, Issue No. IC-13. The FCC has, however, acted upon the Core Forbearance Petition. Staff's recommendation are based upon the FCC's existing rules and regulations including those included in the FCC's Order in the Core Forbearance proceeding.

traffic, including ISP-bound traffic. Thus, Staff recommends the Commission accept SBC's proposal to reference the term "Section 251(b)(5) Traffic" in Appendix Intercarrier Compensation, Section 5. Staff IB, at 21.

Level 3 recommends the parties continue forward with their existing contract rates for Section 251(b)(5) traffic and ISP-bound traffic --- a rate of $0.0005 per minute of use. Level 3 Ex. 1.0 (Hunt) at 62. Level 3's position with respect to this issue is decidedly unclear. As explained above, Level 3 appears to the Staff to propose that the Commission ignore existing intercarrier compensation rules and instead simply carry forward existing intercarrier compensation rates contained in the parties' existing contract. Even if Staff misapprehends Level 3's position, and Level 3 is not recommending that the Commission ignore existing intercarrier compensation rules, Level 3 has not explained how its proposal complies with the *ISP-Bound Traffic Order*. Staff IB, at 21-22.

The Staff finds that Level 3's failure to explain the interaction between its proposal and the *ISP-Bound Traffic Order* adds general uncertainty to resolution of this issue. For example, under the *ISP-Bound Traffic Order*, SBC is entitled to, and has in fact elected to, invoke FCC-defined rate caps for the exchange of ISP-bound traffic. ISP-Bound Traffic Order, ¶ 89 and ILL.C.C. No. 20, Part 23, Section 2, 5th Revised Sheet No. 3. n. 1. In making this election, SBC is required to offer to exchange Section 251(b)(5) traffic at the same rates that apply for the exchange of ISP-bound traffic. ISP-Bound Traffic Order, ¶ 89. Thus, with respect to the FCC's framework the ball is in Level 3's court. That is, the FCC rules require SBC and Level 3 to exchange Section 251(b)(5) traffic at the same rate as ISP-bound traffic *if* Level 3 elects to do so. However, Level 3 has not indicated in this proceeding, and presumably has not indicated to SBC, whether or not it wants to elect the ISP-bound rates for 251(b)(5) traffic. Like SBC, Staff is left to assume that Level 3 prefers the rates to be the same because the rates in the existing contract between to the two carriers are the same. Staff IB, at 22.

The Staff assumes that Level 3 prefers to exchange both Section 251(b)(5) and ISP-bound traffic at the same rate, inasmuch as Mr. Hunt's testimony states with approval that the FCC is moving towards such a regime. Level 3 Ex. 1.0 (Hunt) at 30-31. In essence, the Staff is assuming that if the Commission rejects Level 3's proposal to establish a rate of $0.0005 for both Section 251(b)(5) and ISP-bound traffic, and instead orders the parties to exchange ISP-bound traffic at a rate of $0.0007, Level 3 would prefer to exchange Section 251(b)(5) traffic at a rate of $0.0007, rather than at the intercarrier compensation rates contained in SBC's existing Illinois tariffs, or at some other rates (such as the bifurcated rates contained in SBC's alternative proposals). In the event that Level 3 fails to confirm Staff's assumption, Staff recommends the Commission order the parties to adopt a uniform rates for Section 251(b)(5) and ISP-bound traffic. The FCC has expressed a clear policy of seeking to unify intercarrier compensation rates, *see Order*, ¶2, Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the *ISP Remand Order*, FCC No. 04-241; WC Docket No. 03-171 (rel. October 18, 2004) (hereafter "Core

Forbearance Order") ("The Commission [is] particularly interested in identifying a unified approach to intercarrier compensation that would apply to all types of traffic and to interconnection arrangements between all types of carriers"), and Staff recommends the Commission follow that policy here to the extent it can within the boundaries of current federal and state law. Staff IB, at 22-23.

The Staff points out that under a unified compensation regime, the disputes with respect to this issue can be greatly simplified. That is, all sub-issues concerning rate structure issues (i.e., SBC Issues 10c, 10d, and 10e) become moot. The primary issue here simplifies to whether the parties should exchange both Section 251(b)(5) and ISP-bound traffic at a rate of $0.0007 per minute of use, or whether the parties should exchange both Section 251(b)(5) and ISP-bound traffic at a rate of $0.0005. Staff IB, at 23.

Staff recommends that the Commission accept Level 3's proposed rate of $0.0005. Staff IB, at 23. First, $0.0005 is clearly below the rate cap of $0.0007 established by the FCC and is therefore consistent with the FCC rules. Second, the FCC states:

> Because the transitional rates are caps on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep, and no transition is necessary for carriers already exchanging traffic at rates below the caps.

ISP-Bound Traffic Order, ¶8.

The rate of $0.0005 per minute of use, the Staff notes is the existing rate at which the Commission has authorized the parties to exchange such traffic and is a rate closer to bill and keep than $0.0007. Order in Docket No. 03-0392. Order in Docket No. 03-0392. Therefore, according to Staff a rate of $0.0005 is not only consistent with the FCC rules and regulations, but also consistent with the policy directives outlined in the *ISP-Bound Traffic Order*. Staff IB, at 24.

To implement Staff's recommendation, the Commission need only adopt SBC's proposed language for Appendix Intercarrier Compensation Section 5. In substance, this language serves only to point to SBC's proposed Intercarrier Compensation Section 6, which contains applicable intercarrier compensation rates in the event that SBC elects the FCC rate caps for ISP-bound traffic. However, since SBC has in fact elected the FCC rate caps, this regime would therefore be adopted as a mater of law. Staff notes that its recommendation here is contingent on adoption of its recommendations regarding modification of Section 6 explained below (within Issue IC - 13). Staff IB, at 24.

Issue IC – 11

Issue IC – 11

SBC's proposed language for Appendix Intercarrier Compensation 7.2 incorporates the Commission's previously ordered treatment of VNXX or FX-like traffic into the agreement. Staff IB at 30, *et seq*. Accordingly, Staff recommends the Commission adopt SBC's proposed language for Appendix Intercarrier Compensation 7.2. Id.

Staff notes that the Commission has addressed this issue on a number of occasions, and the Commission has repeatedly determined that a "bill and keep" regime is proper. Staff Ex. 1.0 (Zolnierek) at 19 In Staff's view, nothing in the record in this proceeding compels a different conclusion. Staff IB at 30, *et seq*.

Staff observes that the Commission has ordered implementation of "bill and keep" regimes for FX-like or VNXX traffic, based on stated policy goals of: (1) preserving the consumer benefits that coincide with the use of FX-like or VNXX arrangements, AT&T Arbitration Order at 124; and (2) preventing one LEC from subsidizing the FX-like or VNXX like offerings of another LEC. *Order on Rehearing* at 16, Global NAPs Illinois, Inc.: Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Verizon North, Inc., f/k/a GTE North Incorporated and Verizon South, Inc., f/k/a GTE South Incorporated, ICC Docket No. 02-0253 (November 7, 2002). In Staff's opinion, these policy goals are as germane today as they were when the Commission issued its previous findings. Staff IB at 30, *et seq*. Furthermore, Staff notes that nothing in the FCC's recently released *Core Forbearance Order* requires the Commission to alter its previous determinations on these issues. Id.

Staff observes that, in the *Core Forbearance Order*, the FCC revisited its Section 251(b)(5) and ISP-bound traffic intercarrier compensation rules and regulations, and expressed a policy goal of unifying intercarrier compensation regimes. *Order*, ¶23, Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the *ISP Remand Order*, FCC No. 04-421, WC Docket No. 03-171 (rel. October 18, 2004)(hereafter "Core Forbearance Order"). Based on this policy, Staff notes, the FCC determined that ISP-bound traffic should be subject to a single rate rather than a bifurcated rate depending on whether it is existing versus new or growth traffic. Id., ¶24. Staff notes that, as such, the FCC adopted a single rate for a single type of traffic rather than two rates for the same type of traffic. Staff IB at 30, *et seq*.

Here, Staff avers, the circumstances are markedly different. Staff IB at 30, *et seq.* VNXX or FX-like traffic flows from a calling party in one local calling area to a called party in a separate local calling area and thus differs from traffic flowing from a calling party located in one local calling area to a called party located in the same local calling area. Id. Thus, in Staff's view, the FCC's *Core Forbearance Order* does not

require, either implicitly or explicitly, that the Commission impose a single unified rate upon two disparate types of traffic. Id.

In Staff's view, adopting a unified rate for disparate types of traffic may be a laudable action in the course of reforming the entire system of intercarrier compensation. Staff IB at 30, *et seq.* However, the Commission is still required to make determinations in the proceeding navigating within a federal structure that imposes differing intercarrier compensation rates upon traffic, depending upon the jurisdictional nature of the traffic. Id. VNXX or FX-like traffic does not fit neatly into this existing system, and consideration of a policy goal of unifying rates does not assist in resolution of this problem. Id. The Commission has in the past struck a balance that preserves its policy goals and at this time, under the current federal intercarrier compensation structure, Staff recommends that the Commission maintain that balance as it has in the past. Id.

Similarly, Staff notes that the Commission has also determined previously that bill and keep should apply to ISP-bound VNXX or FX-like traffic. Staff Ex. 1.0 (Zolnierek) at 20. In making this finding, the Commission stated:

> In the ISP Remand Order, the FCC stated that where a state commission had instituted a bill and keep arrangement for ISP bound traffic, that arrangement would remain in place. In Illinois, we have repeatedly held that FX-like traffic is not subject to reciprocal compensation, but rather we have instituted a bill and keep regime. In our limited role of upholding FCC orders concerning ISP bound traffic, we conclude that the ISP bound FX traffic between AT&T and SBC will also be subject to bill and keep. To do otherwise would contradict the FCC's stated policy goals to reduce carriers' reliance on carrier to carrier payments.
>
> AT&T Arbitration Order at 120

Staff takes the view that the situation that obtains here is, based upon the record, no different from that which obtained in those proceedings where the Commission made its previous determinations, and that, accordingly, there is nothing here that should cause the Commission to alter its previous findings. Staff IB at 30, et seq.

With respect to the impact of the *Core Forbearance Order*, Staff notes that VNXX or FX-like ISP-bound traffic flows from a calling party in one local calling area to an ISP in a separate local calling area and is, therefore, similar to VNXX or FX-like traffic, which flows from a calling party in one local calling area to a called party in a separate local calling area. Id. Therefore, adopting a unified rate for these two types of traffic not only comports with previous commission findings but with the actions taken by the FCC in its Core Petition to unify similar traffic types. Id.

Issue IC – 13

Staff recommends that SBC's proposal should be accepted. Staff IB at 25 et seq. Staff notes that in the event that all Section 251(b)(5) and ISP-bound traffic is exchanged at a uniform rate (as recommended by Staff), there will be no need for the parties to separately identify Section 251(b)(5) and ISP-bound traffic. Id. Therefore, acceptance of SBC's proposal may have no impact on the contract. Id. However, if Level 3 seeks separate rates for Section 251(b)(5) and ISP-bound traffic, this provision will be relevant. Id. Because of this possibility Staff recommends retaining language appropriate to address this eventuality, despite the high probability that it will be rendered irrelevant by other terms and conditions of the contract. Id.

In order to implement Staff's proposal the Commission should order the parties to include SBC's proposed Appendix Intercarrier Compensation, Section 6 in their contract, amended as follows:

6. RATES, TERMS AND CONDITIONS OF FCC'S INTERIM ISP TERMINATING COMPENSATION PLAN

6.1 The Parties hereby agree that the following rates, terms and conditions set forth in Sections 6.2 through ~~6.6~~ 6.3 shall apply to the termination of all Section 251(b)(5) Traffic and all ISP-Bound Traffic exchanged between the Parties in each of the applicable state(s). SBC-13STATE has made an offer as described in Section 5 above effective on the later of (i) the Effective Date of this Agreement and (ii) the effective date of the offer in the particular state ~~and that all ISP-Bound Traffic is subject to the growth caps and new market restrictions stated in Sections 6.3 and 6.4, below~~.

6.2 Intercarrier Compensation for all ISP-Bound Traffic and Section 251(b)(5) traffic

6.2.1 The rates, terms, conditions in Sections 6.2 through ~~6.6~~ 6.3 apply only to the termination of all Section 251(b)(5) Traffic and all ISP-Bound Traffic as defined in Section 3.2 and Section 3.3 above ~~and is subject to the growth caps and new market restrictions stated in Sections 6.3 and 6.4 below~~.

6.2.2 The Parties agree to compensate each other for the transport and termination of all Section 251(b)(5) and ISP-Bound Traffic and traffic on a minute of use basis, at ~~$.0007~~ $0.0005 per minute of use.

6.2.3 Payment of Intercarrier Compensation on ISP-Bound Traffic and Section 251(b)(5) Traffic will not vary according to whether the traffic is routed through a tandem switch or directly to an end office switch.

~~6.3 ISP- Bound Traffic Growth Cap~~

~~6.3.1 On a calendar year basis, as set forth below, the Parties agree to cap overall ISP-Bound Traffic minutes of use based upon the 1st Quarter 2001 ISP minutes for which the LEVEL 3 was entitled to compensation under its Interconnection Agreement(s) in existence for the 1st Quarter of 2001, on the following schedule:~~

~~Calendar Year 2001 1st Quarter 2001 compensable ISP-Bound Traffic minutes, times 4, times 1.10~~

~~Calendar Year 2002 Year 2001 compensable ISP-Bound Traffic minutes, times 1.10~~

~~Calendar Year 2003 Year 2002 compensable ISP-Bound Traffic minutes~~

~~Calendar Year 2004 and thereafter Year 2002 compensable ISP-Bound Traffic minutes~~

~~6.3.2 Notwithstanding anything contrary herein, in Calendar Year 2004, the Parties agree that ISP-Bound Traffic exchanged between the Parties during the entire period from January 1, 2004 until December 31, 2004 shall be counted towards determining whether LEVEL 3 has exceeded the growth caps for Calendar Year 2004.~~

~~6.3.3 ISP-Bound Traffic minutes that exceed the applied growth cap will be Bill and Keep. "Bill and Keep" refers to an arrangement in which neither of two interconnecting parties charges the other for terminating traffic that originates on the other party's network; instead, each Party recovers from its end-users the cost of both originating traffic that it delivers to the other Party and terminating traffic that it receives from the other Party.~~

~~6.4 Bill and Keep for ISP-Bound Traffic in New Markets~~

~~6.4.1 In the event the Parties have not previously exchanged ISP-Bound Traffic in any one or more LATAs in a particular state prior to April 18, 2001, Bill and Keep will be the reciprocal compensation arrangement for all ISP-Bound Traffic between the Parties for the remaining term of this Agreement in any such LATAs in that state.~~

~~6.4.2 In the event the Parties have previously exchanged traffic in a LATA in a particular state prior to April 18, 2001, the Parties agree that they shall only compensate each other for completing ISP-Bound Traffic exchanged in that LATA, and that any ISP-Bound Traffic in other LATAs shall be Bill and Keep for the remaining term of this Agreement.~~

~~6.5 Growth Cap and New Market Bill and Keep Arrangements~~

~~6.5.1 Wherever Bill and Keep for ISP-Bound traffic is the traffic termination arrangement between the Parties, both Parties shall~~

~~segregate the Bill and Keep traffic from other compensable traffic either (a) by excluding the Bill and Keep minutes of use from other compensable minutes of use in the monthly billing invoices, or (b) by any other means mutually agreed upon by the Parties.~~

~~6.5.2 The Growth Cap and New Market Bill and Keep arrangement applies only to ISP-Bound Traffic, and does not include Optional EAS traffic, Intra LATA Inter exchange traffic, or Inter LATA Inter exchange traffic.~~

~~6.6~~ 6.3 ISP-Bound Traffic Rebuttable Presumption

~~6.6.1~~ 6.3.1 In accordance with Paragraph 79 of the FCC's ISP Compensation Order, the Parties agree that there is a rebuttable presumption that any of the combined Section 251(b)(5) Traffic and ISP-Bound Traffic exchanged between the Parties exceeding a 3:1 terminating to originating ratio is presumed to be ISP-Bound Traffic ~~subject to the compensation and growth cap terms in this Section 6.3~~. Either Party has the right to rebut the 3:1 ISP-Bound Traffic presumption by identifying the actual ISP-Bound Traffic by any means mutually agreed by the Parties, or by any method approved by the Commission. If a Party seeking to rebut the presumption takes appropriate action at the Commission pursuant to Section 252 of the Act and the Commission agrees that such Party has rebutted the presumption, the methodology and/or means approved by the Commission for use in determining the ratio shall be utilized by the Parties as of the date of the Commission approval and, in addition, shall be utilized to determine the appropriate true-up as described below. During the pendency of any such proceedings to rebut the presumption, the Parties will remain obligated to pay the presumptive rates ~~(the rates set forth in Section 5 for traffic below a 3:1 ratio, the rates set forth in Section 6.2.2 for traffic above the ratio)~~ subject to a true-up upon the conclusion of such proceedings. Such true-up shall be retroactive back to the date a Party first sought appropriate relief from the Commission.

6.7 For purposes of this Section 6, all Section 251(b)(5) Traffic and all ISP-Bound Traffic shall be referred to as "Billable Traffic" and will be billed in accordance with Section 15.0 below. The Party that transport and terminates more "Billable Traffic" ("Out-of-Balance Carrier") will, on a monthly basis, calculate (i) the amount of such traffic to be compensated at the FCC's interim ISP terminating compensation rate set forth in Section 6.2.2 above and (ii) the amount of such traffic subject to bill and keep in accordance with Sections 6.3, 6.4 and 6.5 above. The Out-of-Balance Carrier will invoice on a monthly basis the other Party in accordance with the provisions in this Agreement and the FCC's interim ISP terminating compensation plan.

Staff IB at 27-30.

Staff notes that this proposal incorporates the $0.0005 per minute of use rate recommended by Staff in Issue IC – 10 above. Staff IB, at 30.

Issue IC – 14

In the Staff's view, Level 3's proposed contract language for this issue lacks clarity, to the extent that it could, if adopted, nullify much of the rest of the ICS, since its reference to "tariffs" would include almost any imaginable service or element. Staff IB at 33-35. SBC's proposal is preferable, with the exception of its recommendation that language be included specifying that all exchange access traffic and intraLATA toll traffic will be governed by the terms and conditions of applicable federal and state tariffs, since this could be interpreted to override any specific provisions regarding exchange access or intraLATA toll traffic that are included in the final ICA. Id.

Accordingly, Staff recommends adoption of SBC's language for Appendix Intercarrier Compensation, Section 7.1, with the following modifications in underline / strikeout format:

> ***The compensation arrangements set forth in Sections 5 and 6 of this Appendix are not applicable to (i) interstate or intrastate Exchange Access traffic, (ii) Information Access traffic, (iii) Exchange Services for access or (iv) any other type of traffic found to be exempt from reciprocal compensation by the FCC or the Commission, with the exception of ISP-Bound Traffic which is addressed in this Appendix. All Exchange Access traffic and IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of applicable federal and state tariffs unless otherwise specified within this Agreement, but only to the extent the tariffs are applicable to the exchange of the specific exchange access traffic and intraLATA toll traffic.***

Staff IB at 34-35

Issue IC – 15

Staff notes that SBC proposes inclusion of clarifying language in Appendix Intercarrier Compensation Section 7.4 and 7.5 that specifies the proper treatment of ISP-bound traffic provided, for example, under FX-like or through traditional LEC-IXC-

LEC arrangements. Staff IB at 35. In Staff's view, such a provision would clarify, for example, that when an SBC customer places a call to an ISP both located outside the callers local calling and with a telephone number outside the local calling area that any intermediate carrier performing what is essentially long distance transport would not be eligible for reciprocal compensation at the rate specified in Appendix Intercarrier Compensation Sections 5 and 6, but would rather be responsible for switched access charges. Id. This clarifying language is consistent with the treatment Staff recommends for the various types of ISP-bound traffic and adds clarity to the contract. Id. Therefore, Staff recommends that the Commission adopt SBC's proposed language in Appendix Intercarrier Compensation Sections 7.4 and 7.5. Id.

Issue ITR – 1

SBC proposes to prohibit Level 3 from sending interLATA toll traffic over local interconnection trunk groups – a proposal that Level 3 opposes. Appendix ITR, Section 12. Staff IB at 35, et seq.

Staff notes that the benefits from combining both interLATA toll traffic with other traffic carried on local interconnection trunk groups include reductions in the number of interconnection facilities the companies need to deploy and reductions in the number of tandem ports used. Staff IB at 35, *et seq*. InterLATA toll traffic is subject to switched access charges, while traffic such as 251(b)(5) traffic is subject to reciprocal compensation rates. 47 U.S.C. §251(b)(5); 47 C.F.R. §§51.701, *et seq*., 69.5. Therefore, the costs of combining such traffic over common local trunk groups include the costs of measuring such traffic and the costs associated with inaccurately measuring and billing such traffic. Staff IB at 35, *et seq*.

In Staff's view, the benefits, in terms of facilities cost savings, will depend on the size of any reduction in interconnection facilities needed when traffic is combined over common trunk groups. Staff IB at 35, *et seq*. Tandem switch exhaust will also be dependent on the number of interconnection facilities that are used to exchange traffic. Tr. 244-245. While the parties offer competing theories regarding why reductions *might* occur, they have not come forward with evidence in this proceeding regarding the specific size of such reductions if any. Staff IB at 35, *et seq*. Level 3's evidence is, in Staff's view, equivocal at best, while SBC's has offered little or no evidence regarding these questions. Staff IB at 35, *et seq*.

Similarly, there is little evidence tending to quantify the costs associated with incorrectly measuring and billing traffic. Staff IB at 35, *et seq*. Level 3's evidence is backward-looking, and there is little to no evidence that quantifies the costs of establishing and maintaining a system to accurately measure and bill jurisdictionally diverse traffic passed over common trunk groups. Id.

In sum, the parties have provided little in the way of quantifiable evidence regarding the costs and benefits of passing intraLATA toll traffic over common trunk

groups. Staff IB at 35, *et seq*. There is, however, some limited evidence to suggest that neither the costs of establishing separate trunk groups, nor the costs of measuring and billing jurisdictionally diverse traffic passed over common trunk groups, is particularly significant. Id. First, SBC's contends that Level 3 currently has substantial excess trunk capacity. SBC Ex. 1.1 (Albright) at 8. To the extent that Level 3 in fact has such excess capacity, this is inconsistent with Level 3's arguments regarding the significance of costs that excess capacity causes, both directly - through investment costs, and indirectly - through costs associated with tandem exhaust. Staff IB at 35, *et seq*. Second, Staff's support for and the Commission's past determinations to accept SBC's proposal to separate intercarrier compensation rating structures relied on SBC's assertions that measurement of such traffic through usage factor proxies was a reasonable exercise. AT&T Arbitration Decision at 124. This suggests then that percentage usage factors can be relied on without imposing excessive costs on the parties, as Level 3 suggests. Staff IB at 35, *et seq*.

Thus, based upon the available evidence, neither maintaining separate trunk groups for jurisdictionally diverse traffic, nor combining such traffic over common trunk groups, appears to be an unduly burdensome outcome. Thus, the Commission can adopt either party's proposal. Staff IB at 35, *et seq*. Nevertheless, it is Staff's recommendation that the Commission adopt SBC's proposal, which would require Level 3 to do, what it states it normally would do in any case, and pass interLATA toll traffic over feature group D trunk groups rather than over local interconnection trunk groups. Id.

The Commission has denied, based on an incomplete proposal, at least one other carrier the ability to combine such traffic over common trunks. Staff Ex. 1.0 (Zolnierek) at 18. Level 3 has certainly failed to provide evidence for the Commission to alter that decision here. Staff IB at 35, *et seq*. In addition, with no evidence that either proposal is unduly burdensome on the parties, SBC's proposal, which will prevent misidentification of traffic, is to be favored. Id. It is for these reasons that the Commission should accept SBC's position on this issue. Id.

Going forward a more significant issue may be the appropriate routing of IP-PSTN VoIP traffic. Staff IB at 35, *et seq*. However, the Commission should not decide this issue, inasmuch as the parties already have taken actions that would require the FCC to decide it and because the FCC has stated "that [it, the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to IP-enabled services." FCC News Release, "FCC Finds That Vonage Not Subject To Patchwork of State Regulations Governing Telephone Companies", (November 9, 2004); http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254112A1.doc.

For these reasons Staff recommends the Commission accept SBC's proposed language for Appendix ITR Section 1.2 which would have the effect of limiting the scope of this contract by excluding from the contract rates, terms, and conditions for interLATA toll traffic and IP-PSTN VoIP traffic. Staff IB at 35, *et seq*.

Issue ITR – 2

Staff notes that SBC proposes to exchange traffic with Level 3 over local interconnection groups only when the traffic is exchanged between SBC and Level 3's end users. Appendix ITR, Section 3.3. To Staff, SBC's position appears to be that this language is intended to prevent Level 3 from passing third party IXC traffic over local interconnection trunk groups. Level 3 – SBC 13State – DPL – ITR – Issue No. ITR 2. Level 3 objects to SBC's proposal on the grounds that SBC's proposal would prevent both Level 3 and SBC from transiting traffic. Id.

Staff recommends the Commission reject SBC's proposal to include the phrase "for the exchange of traffic between each Party's End Users only" in the first and second paragraph of Appendix ITR, Section 3.3. Staff IB at 41, *et seq*. Nothing prohibits Level 3 from providing wholesale local exchange or exchange access services. Id. SBC has proposed restrictions on the use of common trunk groups that would, if accepted - as Staff recommends - prevent Level 3 from passing interLATA toll traffic (whether transited or not) over local interconnection trunks, thereby obviating SBC's asserted concerns in this regard. Id. Adding SBC's additional "end user" restriction is therefore in Staff's view unnecessary to prevent Level 3 from passing interLATA toll traffic (or other prohibited forms of traffic) over local interconnection trunks. Id. Thus, Staff considers SBC's proposed language redundant at best. Id.

More problematic, in Staff's opinion, is the fact that SBC's language might well prevent Level 3 from passing *permissible* traffic -- such as Section 251(b)(5) traffic -- over local interconnection trunks when Level 3 acts as a transiting provider or as a wholesale provider for another retail provider. Staff IB at 41, *et seq.* In addition, this language appears to preclude the exchange of all meet point traffic, which as Staff understands it, is defined as traffic passed from third party IXC providers. Tr. 646-47. In fact, because Level 3 has no end users, Tr. 150, SBC's proposal appears to require Level 3 to cease exchanging traffic with SBC entirely. Staff IB at 41, *et seq*. Thus, SBC's proposal should be rejected. Id.

Issue ITR – 5, 6, 7, 8, and 9

The parties agree that SBC is not specifically required to provide transit service according to FCC rules. Level 3 Ex. 1.0 (Hunt) at 53; Level 3 – SBC 13State – DPL – ITR, Issue ITR – 6. Nevertheless, Level 3 proposes to include transiting service within the agreement citing as support policy considerations that arise when SBC fails to provide transiting service. Level 3 Ex. 1.0 (Hunt) at 55-56.

Staff considers potential public policy concerns that might result from SBC's failure to provide transit service to be essentially irrelevant, inasmuch as SBC makes such service available. Staff IB at 43. SBC has a currently effective transit offering in its

Illinois tariffs. Staff EX. 1.0 (Zolnierek) at 22. Level 3 therefore can obtain transit service through SBC's Illinois tariffs, despite the fact that FCC rules do not specifically require SBC to provide such service. Staff IB at 43.

For these reasons, Staff recommends the Commission reject Level 3's proposal to include transit service rates, terms, and conditions within the agreement. Staff IB at 43. That is, Staff recommends the Commission reject Level 3's proposed Appendix ITR, Section 4.3 language including subsections 4.3.1, 4.3.2, 4.3.3, and 4.3.4. Id.

Issue ITR – 12(a)

For the reasons identified with respect to Issue ITR – 1 above, Staff recommends that Level 3's proposal to combine interLATA and intraLATA traffic over common trunk groups be rejected. Staff IB at 43. The Staff therefore recommends that the Commission accept SBC's proposed language and reject Level 3's language for Appendix ITR, Section 5.3.3.1. Id.

Issues ITR – 18, 19

As an initial matter, Staff recommends that the Commission refrain from, for the reasons articulated in Issue IC – 2 above, determining rates, terms, and conditions for the exchange of IP-enabled traffic. Staff IB at 43-44. Accordingly, Staff recommends that the Commission reject all disputed language that does specify rates, terms, and conditions for IP-enabled traffic, including Level 3's cross reference to its proposed definition of circuit switched traffic (which merely serves as a complement to its proposed definition of IP traffic). Id. To implement this recommendation, the Staff recommends, consistent with its recommendations regarding Issue IC – 2, that the Commissions adopt SBC's language for Appendix ITR Sections 12.1 and 12.2, but also require the parties to revise this language to specifically indicate that it does not apply to IP-PSTN "VoIP" traffic. Staff IB at 43-44.

With respect to the consistency concerns identified by Level 3, Staff concurs with the general notion inherent in Level 3's proposal that traffic should be defined consistently between sections. Staff IB at 43-44; Level 3 – SBC 13State – DPL - ITR, Issues ITR 18 and 19. However, SBC's Appendix ITR Sections 12.1 and 12.2 appear to match word for word SBC's Appendix IC Sections 16.1 and 16.2. Staff IB at 43-44. Therefore, adopting Staff's recommendation will not result in inconsistency between these sections. Id.

Issue UNE – 1

In the Staff's view, the parties bring this dispute before the Commission in a manner that places the Commission in a difficult position. Staff IB at 45, *et seq*. The

parties' competing proposals would result in numerous different UNE rates, terms, and condition, but the parties do not frame the dispute in terms of such differences. Id. In essence, the parties ask the Commission to make an all or nothing decision. Id.

However, in the Staff's view, determining which proposal is the most appropriate requires the Commission to determine, among other things, which parties resulting UNE rates, terms, and conditions best meet the requirements of Section 251 of the Act. Staff IB at 45, *et seq*.

Of the two proposals, Staff considers Level 3's the clearer of the two with respect to implementation. Id. Level 3 proposes to incorporate the UNE appendix from the parties existing agreement into the new agreement. Level 3 – SBC 13State – DPL – UNE, Issue No. UNE 1. Level 3 proposes that the parties abide by the rates, terms, and conditions of the existing contract until the FCC releases permanent UNE rules. Id.

However, Staff is compelled to conclude that Level 3's proposal, while easily understood, is inconsistent with the FCC's *Interim UNE Order*. Staff IB at 45, *et seq*.

The D.C. Circuit Court vacated the FCC's impairment determinations with respect mass market switching, enterprise market loops and dedicated transport. United States Telecom Association v. Federal Communications Commission, 359 F.3d 554, 594-595, 2004 U.S. App. Lexis© 3960. (D.C. Cir. 2004) ("USTA II"). Furthermore, the FCC has conditioned SBC's requirement to provide certain other UNEs on its requirement to unbundle local switching. Interim UNE Order, ¶4. These elements include CNAM databases and/or information, LIDB databases and/or information, toll free databases and/or information, SS7 systems, shared transport, and Operator Services and Directory Assistance (OS/DA). 47 C.F.R. §51.319(d)(4)(i-ii). The FCC has specified that each of these elements must be made available only when unbundled local switching is made available. TRO, ¶¶534, 544, 549, 551, 560. Therefore, In the Staff's view, the FCC rules do not currently require SBC to provide these elements as Section 251 UNEs. Staff IB at 45, *et seq*.

Despite the fact that the FCC does not have currently effective rules with respect to these UNEs, SBC is obligated by the FCC's *Interim UNE Order* to provide these UNEs to Level 3 as it did under an effective interconnection agreement or state tariff on June 15, 2004. Staff IB at 45, *et seq*. That is, the FCC, imposing any specific rules regarding these UNEs, has frozen the rates, terms, and conditions under which they were offered to Level 3 by SBC. Id. The FCC did not, however, freeze the rates, terms, and conditions under which all UNEs must be provided. For example, neither the FCC rules nor the FCC's *Interim UNE Order* currently require SBC to provide UNE enterprise switching. 47 C.F.R. § 51.319(d)(3).

The interim freeze on the parties' contract rates, terms, and conditions is finite in duration. Staff IB at 45, *et seq*. That is, it terminates: (1) six months from September 13, 2004 (the effective date of the Interim UNE Order), or (2) when the FCC adopts superceding rules, whichever date is earlier. Id. The FCC established directives for a

second sixth month period following the interim freeze, which it has termed a "transition period." Interim UNE Order, ¶29.

The Commission, in another arbitration, ordered SBC to incorporate the terms of this transition period into its contract. XO Arbitration Decision at 95-96. However, subsequent to the Commission's determination, the FCC stated that its "transition period" directives do not constitute final agency action, have no legal force whatsoever, and instead represent a proposal that the agency may or may not adopt when it issues its final rules. *FCC Opposition of Respondents to Petition for Writ of Mandamus*, USTA v. FCC, No. 00-1012(and consolidated cases) (D.C. Cir. 2004), September 16, 2004, at 8, n. 2.

Staff notes that this statement was, perhaps, based in the exigencies of litigation; nonetheless, this Commission ignores it at its peril, and might be well advised to assume there is no currently effective federal Section 251 obligation for SBC to provide the UNEs referenced in the *Interim UNE Order* beyond six months from September 13, 2004. Staff IB at 45, *et seq*.

Therefore, it is Staff's opinion that Level 3's proposal is inconsistent with the *FCC's Interim UNE Order* in two respects. Staff IB at 45, *et seq*. First, Level 3 would freeze its existing UNE contract rates, terms, and conditions for all UNEs, rather than the specific subset of UNEs identified for such a freeze by the FCC. Id. Second, it would freeze these rates, terms, and condition indefinitely, rather than for the 6-month period specified by the FCC. Id.

Alternatively, SBC proposes to carry forward selected provisions from the existing contract by way of a "rider" during the 6-month interim period established by the FCC. Level 3 – SBC 13State – DPL – UNE, Issue No. UNE 1. Following this interim period, SBC proposes a replacement UNE appendix that would, among other things, remove certain unbundling requirements. Id. It is not clear to Staff how SBC's proposal could be implemented. Staff IB at 45, *et seq*.

SBC opposes incorporation of the existing contract rates, terms, and conditions into the new agreement. Level 3 – SBC 13State – DPL – UNE, Issue No. UNE 1. However, SBC's proposed rider requires, by its terms, attachment to the agreement in effect on June 15, 2004. *See* SBC Ex. 8.0 (Silver) Attachment B at 1 ("WHEREAS, as of the date the parties executed the Agreement to which this Temporary Rider is attached, the Interim Order was still in effect, and its interim time period(s) had not yet expired[.]") Furthermore, Staff notes that, even if the rider did not require attachment to an existing agreement, it would not, standing alone, provide for UNEs, such as 2-wire analog loops, that SBC remains required to provide under FCC rules. Staff IB at 45, *et seq*.

Therefore, Staff takes the view that, while Level 3's proposal might require SBC to provide UNEs that are unaffected by the freeze, and which the FCC rules no longer require SBC to provide, SBC's proposal would relieve SBC from providing UNEs that

are unaffected by the freeze and which the FCC rules require SBC to continue providing. Staff IB at 45, *et seq*.

SBC further proposes that the Commission require the parties to adopt its proposed Appendix UNE following the expiration of the FCC's interim 6-month freeze period. Staff IB at 45, *et seq*. SBC's proposed Appendix UNE contains numerous disputed issues that the parties have presumably agreed not to request the Commission to resolve and, more importantly, that SBC has failed to support. *See* Appendix UNE (SBC UNE Appendix).

Thus, it is apparent to Staff that neither party has offered an acceptable proposal to the Commission. Staff IB at 45, *et seq*. Accordingly, Staff recommends the Commission: order the parties to include within their contract, on an interim basis, the Appendix UNE from the agreement in effect between the parties on June 15, 2004. Id. The Staff further recommends that the Commission further order the parties to append to their agreement the rider proposed by SBC, which comports the previous contract to the terms, and conditions of the FCC's interim freeze. Id.

With respect to the period following the FCC's interim freeze, Staff recommends that the Commission order the parties to jointly develop an Appendix UNE that incorporates existing federal and state rules and regulations as they currently apply to the period following expiration of the FCC's interim freeze period. Staff IB at 45, *et seq*. The Staff recommends that the Commission require the parties to complete this exercise within 45 calendar days of the adoption of the Commission's arbitration decision in this proceeding. Id. The Staff further recommends that Commission also require the parties, to the extent they cannot agree on rates, terms, and conditions for the Appendix UNE developed for implementation following the FCC's interim freeze period, to present the Commission, again within 45 calendar days, with properly framed issues regarding any disputes for Commission resolution. Id. Staff notes that the 45-day time frame it proposes takes into account the fact that the parties identified numerous disputed issues with respect to their respective proposed Appendix UNEs and ultimately determined to withhold the product of their efforts in this proceeding. Id.

II. CONCLUSION

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

Respectfully submitted,

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