STATE OF ILLINOIS

BEFORE THE ILLINOIS COMMERCE COMMISSION

In the Matter of Level 3, Communications, LLC's 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 d/b/a SBC Illinois	)	Case No. 04-0428

SBC IILLINOIS' INITIAL POST-HEARING BRIEF

Mark R. Ortlieb
Karl B. Anderson
SBC ILLINOIS
225 West Randolph Street
Floor 25D
Chicago, IL 60606
(312) 727-2415
(312) 727-2928

Theodore A. Livingston
Dennis G. Friedman
MAYER, BROWN, ROWE & MAW, LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

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BEFORE THE ILLINOIS COMMERCE COMMISSION

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Illinois Bell Telephone Company, ("SBC Illinois" or "SBC") respectfully submits its Initial Post-Hearing Brief and Position Statement (Attachment 1). In Section II, we address each issue that remains for the Commission to resolve in this proceeding, starting with the General Terms and Conditions issues, and then proceeding alphabetically through the various appendices to the parties' interconnection agreement ("ICA"). First, however, in Section I, we address, at a high level, the issues that Level 3 identified in its arbitration petition as "Tier I" issues – *i.e.*, the matters to which Level 3 attached the most importance.[1]

I. OVERVIEW OF LEVEL 3'S TIER I ISSUES

A. LOCAL INTERCONNECTION AND TRUNKING

Interconnection (Network Interconnection Methods or "NIM")[2]

The principal issue here – the financial consequences that attach to Level 3's choices regarding the points at which the parties will interconnect for purposes of exchanging calls between their respective customers – has been settled. Level 3 has agreed to establish a point of

[1] Level 3's first "Tier I" issue, concerning a single point of interconnection, has been resolved by the parties.

[2] This includes, for example, NIM Issue 6.

interconnection ("POI") at each SBC tandem where the volume of traffic between Level 3 and SBC end users reaches a certain threshold (24 DS1s, or 576 simultaneous voice calls). (This resolves NIM issues 2, 3 and 4.)

This is, in actuality, a "sleeves out of its vest" settlement from Level 3's perspective. Pursuant to commitments made in amendments to the parties' existing interconnection agreements, Level 3 has already established a POI at each SBC tandem where Level 3 has "opened NXX codes" – *i.e.*, established local phone numbers for its customers.[3] This has translated into a POI at virtually every SBC tandem in each LATA (local area) in which Level 3 does business. And Level 3 has made clear, in sworn testimony, that it has no intention of dismantling any of these POIs, even in isolated instances where the 24 DS1 threshold might not yet be satisfied.

This is a situation with which SBC has no quarrel and which Level 3 is evidently content to maintain. In sum, there is no fundamental interconnection, or NIM, disagreement that separates the parties. NIM issue 6 might suggest otherwise – at least with respect to facilities that carry two specific kinds of trunk groups: mass calling trunks and meet point trunks. ("Facilities" are physical facilities – "pipes" if you will – that run between and link switches. Albright Direct at 3-4. In the interconnection world, these facilities link the switch of the CLEC, here Level 3, and the switch of the incumbent, here SBC. *Id.* "Trunks" are the transmission paths that ride over these facilities. *Id.*)

Mass calling trunks are special trunks that carry high volume call-in traffic – *e.g.*, calls to vote in American Idol, to buy concert tickets, or to respond to a radio contest. Albright Direct at

[3] Amendment to Level 3 Contracts Superseding Certain Compensation Interconnection and Trunking Provisions, § 3.1.

27. If this traffic was not segregated and put on these special mass calling trunks, it could overload the network and cause important calls (like 911 calls) to be blocked. *Id.* Each LATA in SBC's territory has a designated access tandem to which this mass calling traffic is routed. SBC is requesting that Level 3 run mass calling trunks for mass calls made by *its* customers to this tandem. Level 3 evidently is amenable to doing so, because it recognizes that such trunks serve an important purpose and because Level 3 expects to attract increasing numbers of customers who are likely to make such calls. Cal. Tr. at 224-229. In the California arbitration proceeding, Level 3 witness Roger DuCloo stated: "We are not opposed to establishing these [mass calling] trunks…." Cal. Tr. at 229. In fact, in section 5.7.1 of the ITR Appendix to the parties' current Interconnection Agreement, Level 3 agreed to establish Mass Calling trunk groups to SBC's tandems: "A dedicated trunk group shall be required to the designated Public Response HVCI/Mass Calling Network Access Tandem in each serving area. This trunk group shall be one-way outgoing only."

The rub comes when we turn to the question of financial responsibility for the facilities on which these mass calling trunks ride. In the event Level 3 has not established a POI at the mass calling access tandem, Level 3 evidently wants SBC to establish and pay for those facilities. There are two things wrong with that. First, these trunks carry only Level 3 generated traffic; their sole purpose is to permit Level 3 customers to make mass calls. Albright Direct at 27-28. Accordingly, Level 3 should bear financial responsibility for the necessary facilities. Second, Level 3 already has a POI at virtually every tandem, including the special mass calling access tandems. Thus, Level 3 has already established and paid for the requisite facilities, and what might appear to be a dispute of some consequence is really no dispute at all. Level 3, apparently, does not disagree.

With respect to meet point trunks, these are trunk groups that carry interexchange traffic from Level 3 customers to interexchange carriers ("IXCs"), *i.e.*, long distance carriers – and vice versa (from the IXCs to Level 3 customers). Albright Direct at 27. SBC comes into the picture only because the IXCs and Level 3 are both interconnected at the SBC tandem. In essence, the IXCs and Level 3 use SBC's tandem to interconnect with one another. Again, Level 3 appears amenable to an arrangement under which it is responsible for establishing these trunk groups (which solely benefit *its* customers), but evidently wants SBC to establish and pay for the facilities on which these trunk groups ride *if* Level 3 is not otherwise required to establish a POI at the tandem in question. And again, there are two obvious reasons that this is wrong. First, the trunk and the facility benefit only Level 3 and its customers. Albright Direct at 27-28. SBC and its customers make no use of them. *Id.* It boggles the mind, therefore, that Level 3 would insist that SBC should have any financial responsibility for them. Second, Level 3 has already established a POI at virtually every tandem and therefore has already established and paid for the requisite facilities. Again, the appearance of a dispute is a mirage.

Trunking (Interconnection Trunking Requirements or "ITR")[4]

There is one overarching trunking issue that *appears* to separate the parties: Should the parties maintain two separate trunk groups – local interconnection trunks for local/intraLATA traffic exchanged between Level 3 customers and SBC customers and meet point trunk groups for interexchange traffic running from Level 3 customers to IXCs and from IXCs to Level 3 customers? Or should Level 3 be permitted to put both kinds of traffic on a single trunk group?

[4] This includes, for example, ITR Issues 1 and 11(a).

Once again, appearances are deceiving. This really is not a meaningful dispute. Level 3 has already established separate trunk groups for the two types of traffic. Level 3 was required to do so under the terms to which it agreed in its existing interconnection agreements with SBC.[5] And Level 3 acknowledges that it has established these trunks in Illinois, Tr. 134 (Hunt), Tr. 232 (Wilson) and concedes that it is willing to exclude meet point traffic from the local interconnection trunks, going forward. Tr. (Wilson) 235.

But lurking here *is* a real dispute. Level 3 in its capacity as an IXC delivers traffic to SBC for routing to SBC local customers. And, acting in the same capacity, Level 3 takes long distance calls made by SBC customers for delivery to other exchanges. When Level 3 does this, Level 3 apparently wants to put the traffic in question on the same trunk groups that carry local/intraLATA traffic exchanged between Level 3 and SBC acting in their capacity as local exchange carriers. And it wants the interconnection agreement at issue in this proceeding to specify that Level 3 is permitted to do so.

Level 3 is thus attempting to smuggle into this arbitration an issue that does not belong here because it exceeds the scope of what can be arbitrated under section 252 of the 1996 Act. When Level 3, *acting as an IXC*, hands off to and takes calls from SBC, it is obtaining switched access service from SBC – terminating access in the case of the "handoff" and originating access in the case of the "take." The terms and conditions that apply to an IXC's purchase of switched

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[5] In Section 5.4.1 of the ITR Appendix to the parties' existing interconnection agreement, Level 3 agreed to establish a Meet Point trunk group separate from the local interconnection trunk group: "InterLATA traffic shall be transported between CLEC switch and the SBC-13STATE Access or combined local/Access Tandem over a 'meet point' trunk group separate from local and IntraLATA toll traffic." And in Section 5.4.3 of the ITR Appendix to that same agreement, Level 3 agreed to establish Meet Point trunk groups at every SBC access tandem: "When SBC-13STATE has more than one Access Tandem in a local exchange area or LATA, CLEC shall establish an InterLATA [*i.e.,* meet point] trunk group to each SBC-13STATE Access Tandem where the CLEC has homed its NXX code(s)."

access service are governed by switched access tariffs – intrastate tariffs on file with the state commission in the case of intrastate long distance calls and interstate tariffs on file with the FCC in the case of interstate long distance calls. These purchases are not governed by interconnection agreements or the local competition provisions of the 1996 Act. Interconnection agreements and the requirements of Sections 251 and 252 that such agreements implement are strictly limited to the obligations of the incumbent vis-à-vis CLECs – *i.e.*, competitive *local exchange carriers*. The 1996 Act's local competition provisions confer no rights on, and create no duties on the part of the incumbent to, *IXCs*.

The sole purpose of this arbitration is to implement the requirements of Sections 251 and 252 of the 1996 Act. And the detailed obligations set forth in those sections (including the obligations under Section 251(b) that all local exchange carriers have with respect to resale, number portability, dialing parity, access to rights of way, and reciprocal compensation, and the obligations under Section 251(c) that apply only to incumbent local exchange carriers, *i.e*., the duty to negotiate and to provide interconnection, access to UNEs, resale, notice of changes and collocation) make no mention of interexchange access. 47 U.S.C. §§ 251, 252. FCC Orders confirm that the local competition provisions of sections 251 and 252 of the Act do not govern terms and conditions of interexchange access service. For example, in paragraph 191 of the *Local Competition Order,* the FCC made clear that the traffic exchanged between SBC and Level 3 where Level 3 is acting as an IXC (*i.e.,* interexchange traffic) is not traffic for which interconnection is required under Section 251(c)(2) of the 1996 Act (*i.e.,* "telephone exchange" and "exchange access" traffic). And, in paragraphs 34 through 41 of the *ISP Remand Order,* the FCC made clear that the terms and conditions relating to access – specifically, access rates –

predate and are separate and distinct from the local competition provisions of Sections 251 and 252.[6] State Commissions and federal courts have held likewise.[7]

The rights and obligations of IXCs vis-à-vis incumbent local exchange carriers are governed exclusively by the incumbent's state and federal switched access tariffs. In the case of SBC, its switched access tariffs provide that the traffic in question, *i.e.*, the traffic handed off to and taken from the IXC, is carried on Feature Group D trunks that are dedicated to that interexchange, access traffic.

Accordingly, what Level 3 is seeking in this arbitration is for the Commission to alter the terms and conditions in SBC's switched access tariffs. And that is something the Commission has no authority to do under the 1996 Act and, in the case of the federal access tariff, it is something that federal law unequivocally prohibits. The Seventh Circuit has held that claims are preempted where resolution of the claim would effectively invalidate a federal tariff. *Cahmann v. Sprint Corp.,* 133 F.3d 484, 486-87 (7th Cir. 1998). And the Seventh Circuit and other federal courts across the nation have held that, under the filed tariff doctrine, claims challenging the reasonableness of an FCC-approved federal tariff are barred, reserving that

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[6] *Local Competition Order*, ¶ 1034 ("We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic"); Order on Remand and Report and Order, *In re Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, ¶¶ 34-41 (2001) ("*ISP Remand Order*") (finding that access traffic is exempted from reciprocal compensation requirements of 251(b)(5)); *id.* ¶ 37 (stating that "Congress excluded all such access traffic from the purview of section 251(b)(5)); *id.* ¶ 39 ("unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g). These services thus remain subject to Commission jurisdiction under section 201").

[7] Arbitration Decision, *Teleport Communications Group Inc. Petition for Arbitration pursuant to § 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Illinois Bell Telephone Co. d/b/a Ameritech Illinois*, (ICC Docket No. 96-AB-001 Nov. 4, 1996), at 15 ("Section 251(c)(2) does not require the incumbent carrier to negotiate for transmission and routing of telephone exchange access."); *Texas Office of Public Utility Counsel v. FCC,* 265 F.3d 313, 324 (5th Cir. 2001) ("The 1996 Act does not compel the FCC to conduct forward-looking cost-studies [with respect to long-distance access charges] because the cost-study requirements of §§ 251(c)(1) and 252(d)(1) do not apply to the interstate access services at issue in this petition.).

evaluation of tariffs to the FCC.[8] These principles are equally applicable here, where Level 3 proposes language for various sections of the ITR Appendix that effectively challenges federal access tariffs.

Moreover, even if what Level 3 is seeking were not beyond the scope of a 251/252 arbitration (which it is), and did not violate federal law (which it does), Level 3's request still should be denied. Intercarrier compensation for interexchange, access traffic is significantly different from intercarrier compensation for local traffic. Albright Direct at 34. A contract provision allowing Level 3 to combine traffic would give Level 3 the means to avoid paying the appropriate access charges. *Id.* at 36-38. Indeed, with today's technology, a CLEC can easily change or delete CPN ("calling party number"), a set of digits and related indicators that allows billing systems to determine the jurisdictional nature of calls, to present an access call as a local call and avoid access charges. *Id.* The only surefire way to know precisely, in real time, how much of the traffic exchanged is local and how much is subject to switched access rates is to have the traffic exchanged over separate trunks – local traffic on local trunks and interexchange, access traffic on access trunks. Albright Direct at 36.

Level 3 attempts to overcome this shortcoming by conjuring a Rube Goldberg scheme of perpetual calculations, audits, and true ups (none of which is clearly set forth in its proposed

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[8] *Metro East Center for Conditioning and Health v. Qwest Communications International, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002) (under "the filed-rate doctrine (sometimes called the filed-tariff doctrine because it covers terms as well a rates) . . . [i]t is the regulatory agency (here the FCC) that possesses exclusive authority to set aside rates, terms, conditions, and other ingredients of a tariff"); *Evanns v. AT&T Corp*., 229 F.3d 837, 840 (9th Cir. 2000) ("the filed rate doctrine bars all claims-state and federal-that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed") (citation and quotation marks omitted); *Fax Telecommunications Inc. v. AT&T*, 138 F.3d 479, 489 (2d Cir.1998) (noting that "[i]f this court were to enforce the promised rate and award damages on that basis, we would effectively be setting and applying a rate apart from that judged reasonable by the FCC, in violation of the nonjusticiability strand of the filed rate doctrine"); *Hill v. BellSouth Telecommunications, Inc*., 364 F.3d 1308, 1317 (11th Cir. 2004) (explaining that the filed tariff doctrine "prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority").

contract language). At the end of the day, even if the parties and the industry could agree on all of the applicable methods, procedures and consequences, all this would ensure would be an administrative headache and enormous transactional expense. It would not and could not eliminate the chance that errors would be made and that traffic would end up either undercompensated or overcompensated. The only way to ensure that that does not happen is to continue the current practice – the one dictated by the switched access tariffs: local traffic is exchanged over local trunks and interexchange, access traffic (carried by Level 3 *in its capacity as an IXC*) is exchanged on separate access trunks. This is what the Commission required in its Arbitration Decision in the Sprint/Ameritech arbitration (96 AB-008), at pp. 6-7, and reaffirmed last year in its Arbitration Decision in the AT&T/SBC arbitration, Docket No. 03-0329, at 151-154. Nothing has changed that would warrant a different result here.

B. TRANSITING[9]

SBC is said to be "transiting" traffic when SBC's network serves as the middleman between Level 3 and a third party carrier. Thus, transit traffic originates on a third-party carrier's network and is handed off to SBC, and SBC then hands off the traffic to Level 3 for termination on Level 3's network, or vice versa. SBC currently offers transiting, and has offered to continue transiting traffic for Level 3, but the parties disagree whether their interconnection agreement, rather than a separate, voluntarily-negotiated agreement, should govern transiting. As SBC demonstrates, transiting terms should not be included in the parties' interconnection agreement, and transiting issues are not subject to arbitration under Section 252 of the 1996 Act, because, as

[9] This addresses ITR Issues 5 through 9.

this Commission has ruled, neither the 1996 Act nor the FCC's rules implementing the Act require SBC to provide transiting.

To be clear, SBC is not seeking to withdraw its transiting services, and is not asking the Commission to rule that SBC can stop transiting traffic. To the contrary, SBC has offered to enter into a voluntary agreement with Level 3 that will contractually obligate SBC to continue to provide transiting at the same rates that currently apply.[10] Indeed, SBC is not even contending that the Commission cannot regulate transiting in a different sort of proceeding. The issue here is simply whether Section 252 provides a forum for setting terms and conditions for transiting. It does not, because transiting is not required by, and thus is not subject to arbitration under, the 1996 Act.

Section 252 does not provide state commissions authority to arbitrate every conceivable dispute between two carriers forming an interconnection agreement. Rather, Section 252 provides for arbitration of disputes arising out of negotiations concerning the duties described in Section 251 of the Act (and the FCC's regulations implementing that Section). 47 U.S.C. §§ 251(c)(1), 252(c). The universe of arbitrable issues is certainly large – including all questions of whether something is a just, reasonable, or nondiscriminatory term or condition of interconnection, network elements or collocation (*see* 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3), 251(c)(6)) – but it is not infinite. In particular, Section 252 does not authorize state commissions to arbitrate questions about things that are not required by Section 251 or 252.

Transiting is not required by Section 251 or 252. There is no mention of transiting anywhere in the 1996 Act, and even Level 3 admits that "[t]here is no FCC rule that requires

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[10] Up to 30 million minutes per month, after which rates begin to increase.

SBC to transit traffic under Sections 251 and 252." Hunt Direct at 53. And this Commission has repeatedly ruled that the 1996 Act does not require SBC to provide transiting. 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*, (Nos. 96 AB-003 and -004 Nov. 26, 1996), at 9-11 (holding: "Is transiting required by the Act, the [FCC Local Competition] Order or state law? It is not."); Arbitration Decision, *Sprint Communications L.P. Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Illinois Bell Telephone Company* (No. 96 AB-008), at 11-12).

Level 3 suggests that Section 251's interconnection requirements extend to transiting. Level 3 is wrong. Section 251 requires SBC to provide "interconnection with the local exchange carrier's network" and to "interconnect . . . with the facilities and equipment of other telecommunications carriers"; it does not require SBC to provide a connection between Level 3's network and the networks of third parties and act as a middleman to transport traffic to and from Level 3's and the third parties' networks. *Local Competition Order*, ¶ 176 ("the term 'interconnection' under section 251(c)(2) refers *only* to the physical linking of two networks for the mutual exchange of traffic" and does *not* include the transport of traffic). If Congress had wanted to make transiting a statutory duty, it could readily have done so. Yet Congress included no such requirement in the 1996 Act.

Level 3 makes much of the alleged expense and difficulty of establishing interconnection with every carrier with which Level 3 wishes to exchange traffic. That is a red herring. Section 251(a) of the Act requires *all* telecommunications carriers, not just ILECs, to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Thus, if Level 3 wishes to exchange traffic with a third party carrier, the statute

requires that carrier to interconnect with Level 3. And if Level 3 enters into a voluntarily agreement with SBC for SBC to transit traffic (such as the agreement SBC has voluntarily offered), the statute requires the third party carrier to interconnect "indirectly" with Level 3 via SBC. But nothing in Section 251(b) or 251(c) even arguably requires SBC to provide such a transiting service. And from that it follows that terms and conditions for transiting are not subject to arbitration.[11]

C. CLASSIFICATION OF TRAFFIC (INCLUDING FX TRAFFIC) AS LOCAL[12]

As the Commission is aware, telecommunications traffic comes in two basic flavors: local and interexchange. The parties do not agree on how one determines whether a particular call, particularly including a Foreign Exchange ("FX") call,[13] is local or interexchange in nature. Level 3 asserts that all that matters is the originating and terminating NPA-NXX codes of a call (the area code and first three digits of the telephone numbers), while SBC posits that the actual geographic locations of the originating and terminating end users control. That is the crux of the parties' dispute regarding FX traffic: whether it is geography or the telephone numbers that count.

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[11] The indirect interconnection duty of Section 251(a) also does not imply a duty to provide transiting. Even if it did, though, the terms and conditions for fulfilling that duty could not lawfully be arbitrated, because the negotiation and arbitration provisions of the Act do not apply to Section 251(a) duties. *See* Section 251(c)(1), requiring negotiation of 251(b) and (c) duties, but not 251(a).

[12] This includes, for example, ITR Issue 14(c) and IC Issues 3 and 11.

[13] Foreign exchange ("FX") service allows a customer physically located in one local calling area (or "exchange"), like Evanston, to have a telephone number that is associated with a different exchange, like Chicago. Thus, callers in Chicago can reach the FX customer in Evanston by dialing a telephone number that *looks* like a Chicago number (thereby avoiding long distance charges), even though the call is transported and terminated at the FX customer's location in the distant Evanston exchange.

Level 3's assertion that only the NPA-NXXs count, without regard to the actual physical locations at which a call originates and terminates, simply does not make sense. A simple analogy may help illustrate the point:

> For at least the last 50 years, all quarterbacks in the National Football League have worn jerseys with a single-digit number – like John Elway, #7 – or a number in the teens – like Johnny Unitas, #19.
>
> Imagine the Bears are playing the Giants in New York and because of a mix-up with the cleaning service, they don't have a jersey for their quarterback Craig Krenzel, Number 16. So before the game, they explain to the officials and the Giants' coaches that Krenzel is going to have to borrow a jersey from a linebacker, and will be wearing #55.
>
> On the Bears' first play from scrimmage, Krenzel drops back, passes the ball to David Terrell, and two seconds after he releases the ball, Krenzel is viciously tackled by the Giants' defensive end. The ref throws a flag, and calls roughing the quarterback. The Giants protest, "He's not the quarterback – he can't be – he's wearing #55, and quarterbacks always wear low numbers."
>
> The ref, of course, looks at the Giants like they're crazy.
>
> The Giants may not be crazy, but they're obviously wrong. The quarterback is the quarterback because of what he does, not because of the number he wears.

Likewise, an interexchange call is an interexchange call because it passes from one local exchange area to another local exchange area. It may be true that calls are *generally* identified as local or not local by comparing the NXX of the calling party with the NXX of the called party. But just as the quarterback is the quarterback because of what he does, and not because of the number he wears, a call is local or not local because of where it comes from and where it goes, not the numbering. *See ISP Remand Order*, ¶ 37 ("all traffic" "that travel[s] to points – both interstate and intrastate – beyond the local exchange" is interexchange traffic subject to access charges).

Level 3 also asserts that FX traffic should be treated as local because SBC delivers such calls to the point of interconnection ("POI") just like a local call, and thus incurs the same costs. That is irrelevant. The same could be said of a call that SBC delivers to the POI that everyone agrees is clearly an interstate interexchange call, such as a traditional long distance call. Under Level 3's reasoning, traditional long distance calls too should be treated as "local." That would clearly be inappropriate

Finally, while Level 3 may think that the current intercarrier compensation scheme (which requires reciprocal compensation for local calls and access charges for interexchange calls, even if a carrier incurs the same costs to transport the calls to the POI) may not make much sense, that is why the FCC has undertaken "a fundamental re-examination of all currently regulated forms of intercarrier compensation" with an eye toward "identifying a unified approach to intercarrier compensation that would apply to all types of traffic and to interconnection arrangements between all types of carriers." *Core Forbearance Order*, ¶ 1.[14] In the meantime, however, the Commission must apply *current* federal law, which distinguishes between calls based on whether or not the call "travel[s] to points . . . beyond the local exchange" in which it originated, not merely on the telephone numbers. *ISP Remand Order*, ¶ 37.

As we detail below, this Commission has already resolved this issue six times, and has ruled each time that FX traffic is subject to bill and keep, not reciprocal compensation. The Commission should reiterate that holding here.

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[14] Order, WC Docket No. 03-171, 2004 WL 2341235, ¶ 2 (FCC rel. Oct. 18, 2004) ("*Core Forbearance Order*").

D. UNES[15]

The question of what UNE terms and conditions to include in the interconnection agreement is affected by the fact that the FCC should soon be issuing new UNE rules, but no one knows exactly when those rules will take effect or what they will require. For purposes of the arbitration decision itself, however, the Commission must apply the law in effect at the time it renders the decision. With that in mind, there are two possibilities: either the FCC's new rules will be issued and in effect before the arbitration decision is due, or they will not.

1. Given the schedule in this case, the most likely scenario is that the new FCC rules will not take effect before the due date for an arbitration decision. If that occurs, the only proper course would be to approve SBC's Appendix UNE, recognizing that it may later need to be modified as to specific network elements when new rules take effect. This is the proper course because SBC's Appendix UNE is the only proposal on the table that complies with current unbundling law after the *TRO* and *USTA II*. Specifically, SBC's Appendix UNE requires unbundling of network elements to the extent such unbundling is still required under the *TRO* and after *USTA II*, but does not require any additional unbundling of elements that are either not required to be unbundled under the *TRO* or as to which *USTA II* vacated any rule that required unbundling. For example, SBC's language requires unbundling of 2-wire and 4-wire copper loops, NIDS, some subloops, and OSS (SBC Appendix UNE, §§ 7-9, 17) but does not require unbundling of enterprise-market switching, entrance facilities, or OCn loops (thus tracking the *TRO*, ¶¶ 315, 365-67, 419) or of mass-market switching or DS1/DS3/dark fiber loops or dedicated transport (thus reflecting the vacatur of the relevant unbundling rules by *USTA II*,

[15] This addresses UNE Issue 1.

359 F.3d at 565-71, 573-75). *See* SBC Appendix UNE §§ 8.3.4, 8.5.5, 9.4.4, 11-14; Silver Direct at 8-10. Furthermore, SBC's Appendix UNE is well designed to deal with FCC rules that take effect after the contract is approved, as it includes specific processes for declassified UNEs and change-of-law processes for newly required UNEs. *See* SBC Appendix UNE, §§ 2.1-2.5.

By contrast, Level 3's UNE proposal is impermissible as a matter of law. The purpose of arbitrations under Section 252 of the 1996 Act is to implement the unbundling requirements of Section 251 as reflected in valid FCC rules and orders. 47 U.S.C. §§ 252(c)(1) & (e)(2)(B). Level 3's proposed language would violate this rule by requiring unbundling of several network elements that are not currently required by any FCC rule or order. At present, for example, there is no FCC rule in effect that requires unbundling of enterprise or mass-market circuit switching, any type of dedicated transport, or high-capacity loops (*USTA II*, 359 F.3d at 565-71, 573-75), yet Level 3's proposed language would require unbundling of all of those elements. *See* Level 3 Appendix UNE, §§ 7, 9, and 10. Level 3 resorts to theories based on sources of law outside the *TRO* and *USTA II* in hopes of supporting its proposal, but all those theories fail:

The *Interim Order*. First and foremost, Level 3 relies on the FCC's *Interim Order*, which requires continued unbundling of mass-market switching, dedicated transport, and high-capacity loops until the FCC issues effective new unbundling rules or March 13, 2005, whichever comes first. *Interim Order*, ¶ 1.[16] The *Interim Order*, however, expressly states that its interim requirements are *not* to be made part of new interconnection agreements. The FCC imposed this limitation in order to prevent CLECs like Level 3 from using the *Interim Order* to perpetuate, in new interconnection agreements, unbundling requirements that were vacated by

[16] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, WC Docket No. 04-313, 2004 WL 1900394, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("*Interim Order*").

USTA II. *Interim Order*, ¶ 23. As the FCC explained, "if the vacated rules were still in place [or reinstated], competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. *The interim approach adopted here, in contrast, does not enable competing carriers to do either*." *Id.* (emphasis added). The FCC emphasized that this was the "[m]ost significant[]" limitation on the scope of the *Interim Order*, for it "forecloses the implementation and propagation of the vacated rules" in new interconnection agreements. *Id.*[17] And if that were not enough, the FCC also told the D.C. Circuit that the order "made clear that its interim rules would not permit CLECs to obtain new contracts under the vacated rules, as the CLECs would have done if the agency had reinstated those rules."[18]

Section 271. Level 3 also relies on Section 271 of the 1996 Act as requiring unbundling of certain network elements. This arbitration, however, is being conducted under Sections 251 and 252, and the only relevant unbundling requirements are those imposed by the FCC under Section 251. *See* 47 U.S.C. § 252(c)(1) (purpose or arbitration is to ensure that the requirements of Section 251 and FCC rules implementing Section 251 are met); *id.*, § 252(e)(2)(B) (same for approval of agreement).

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[17] Further, even if the requirements of the *Interim Order* could be included in new interconnection agreements, those requirements apply only to the three elements specific in the *Interim Order*, whereas Level 3's contract language would appear to require unbundling of several network elements that are not covered by the *Interim Order*, such as enterprise-market switching, entrance facilities, feeder subloops, and SS7 signaling and call-related databases independent of unbundled switching. *Compare* Level 3 UNE Appendix, §§ 9, 10.3.1, 8.1.2, and 12 *with TRO*, ¶ 419 (no requirement to unbundle enterprise switching), ¶¶ 365-67 (no requirement to unbundle entrance facilities), ¶¶ 253-54 (no requirement to unbundle feeder subloops), and ¶ 544 (no requirement to unbundle SS7 signaling or call-related databases independent of switching).

[18] Opposition of Respondents [FCC] to Petition for a Writ of Mandamus, at 2, *United States Telecom Ass'n v. FCC,* No. 00-0012 (D.C. Cir., filed Sept. 16, 2004).

Moreover, Section 271 confers no rulemaking authority upon the Commission. Rather, Section 271 makes clear that the FCC, and *only* the FCC, has authority under section 271 to enforce that provision. A Section 271 application is submitted *to the FCC* (47 U.S.C. § 271(d)(1)), and approval is granted *by the FCC* (*id.* § 271(d)(3)). During the application process, Section 271 does not set forth *any* state commission role or authority other than as a consultant to the FCC. *Id.* § 271(d)(2)(B). A state commission may not "parley 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). Once an application is approved – as SBC Indiana's application has been approved – section 271 provides authority *only to the FCC* to enforce continued BOC compliance with the conditions for approval. 47 U.S.C. § 271(d)(6). There is no provision in Section 271 providing any role to state commissions – not even a consultative role – with respect to the ongoing obligations of the BOCs once they have received approval.

Finally, and perhaps most clearly dispositive, Section 271 does not entitle any individual CLEC to anything. To satisfy the competitive checklist in Section 271(B), the ILEC seeking authorization to provide in-region interLATA service need only show that it has entered into "one or more binding agreements that have been approved under Section 252" and that together satisfy each item in the checklist. *See* 47 U.S.C. §§ 271(c)(1)(A), 271(c)(2)(A)(i), 271(d)(3)(A). Nothing in Section 271 remotely suggests that *any* one CLEC is entitled to an interconnection agreement that satisfies *all* the items on the competitive checklist – or, for that matter, that any CLEC is even entitled to an interconnection agreement that satisfies *any* item on the checklist . Thus, no individual CLEC, including Level 3, can lay claim, in an arbitration under Section 252 or otherwise, to any item on that checklist.

The *SBC/Ameritech Merger Order*. Level 3 next relies on paragraph 394 of the FCC's *SBC/Ameritech Merger Order*,[19] though the relevant provision actually is Condition 17 in Appendix C to that order. Condition 17 required the SBC ILECs to continue providing UNEs that were made available under their interconnection agreements as of January 24, 1999 until, at the latest, "the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area." *SBC/Ameritech Merger Order*, Appendix C, ¶ 53. Condition 17 further states, "This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable [FCC] order in the UNE remand proceeding." Condition 17 has now expired: The FCC issued its "order in the UNE remand proceeding" — the *UNE Remand Order* — on November 5, 1999, and that Order became "final and non-appealable" on March 24, 2003, when the U.S. Supreme Court denied *certiorari* to review the D.C. Circuit's *USTA I* decision.[20] Indeed, in the most recent audit of SBC's compliance with the merger conditions, Ernst & Young concluded that Condition 17 had sunset on March 24, 2003, and the FCC's Staff agreed.[21]

State Law. Level 3 also appears to rely on state law, arguing that the Commission could require unbundling of all the former UNEs in Level 3's old interconnection agreement under state statutes. That is incorrect. The 1996 Act and the courts make plain that the FCC must

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[19] Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, 14 FCC Rcd. 14712 (rel. Oct. 8, 1999) (subsequent history omitted) ("*SBC/Ameritech Merger Order*").

[20] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[21] *See* Letter from Michelle A. Thomas, Executive Director—Federal Regulatory, SBC Communications Inc., to Marlene C. Dortch, Secretary, Federal Communications Commission, CC docket No. 98-141 (Aug. 30, 2004).

decide which network elements are to be unbundled, and it will issue such rules very soon. 47 U.S.C. § 251(d)(1) & (2) ("the [FCC] shall complete all actions necessary to establish regulations to implement the requirements of [Section 251]"; "In determining what network elements should be made available for purposes of subsection (c)(3), the [FCC] shall consider . . . ."); *USTA I*, 290 F.3d at 422 ("Congress . . . charged the [FCC] with identifying those network elements whose lack would 'impair' would-be competitors' ability to enter the market.").

2. If new FCC unbundling rules *do* issue and take effect prior to the arbitration decision, the proper course for the Commission depends on timing. If time reasonably permits the parties to submit briefs on how to implement the new rules and allows the arbitrators to fully consider those submissions, it may be possible to issue an arbitration decision that dictates what network elements must be unbundled and either approves contract language or gives the parties as much guidance as possible on how to craft conforming contract language.

If time does not permit briefing and a reasoned evaluation of the briefs, however, the arbitration decision should direct the parties to create an interconnection agreement that requires unbundling of specific network elements only to the extent required by the new FCC rules, but that otherwise adopts the terms and conditions of SBC's proposed Appendix UNE (*e.g.*, with respect to routine network modifications, declassification, and other non element-specific provisions). The arbitration decision should state that the FCC's new rules are controlling (as it must under 47 U.S.C. § 252(c)(1)), and direct the parties to continue negotiating and submit any remaining disputes to the Commission as part of the agreement-approval process by a fixed deadline (*e.g.*, 60 days after the arbitration decision). This is permissible under 47 U.S.C. § 252(e)(2)(B), which provides that a state commission can reject an agreement adopted by

arbitration "if it finds that the agreement does not meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251." Part of the state commission's role in approving an interconnection agreement is to ensure compliance with FCC rules, so it has the duty to ensure compliance with those rules in the agreement-approval process when compliance could not reasonably be addressed during the arbitration.

* * *

In short, SBC's proposed Appendix UNE is the only legitimate UNE proposal before the Commission and should be adopted in full. If new FCC rules are issued before the arbitration decision, the Commission should evaluate whether the parties can promptly brief the impact of those new rules so that they can be incorporated into the final order.

E. VoIP TRAFFIC AND ACCESS CHARGES[22]

The most significant contract dispute between the parties relating to intercarrier compensation concerns the parties' exchange of communications traffic that uses a transmission technology know as Internet Protocol, or IP. IP is a digital, packetized transmission technology that can support a number of higher level communications applications, such as Voice Over Internet Protocol, or VoIP. The parties' dispute centers on VoIP traffic called "IP-PSTN" (or "PSTN-IP") traffic. IP-PSTN traffic is traffic that originates in IP format, is sent out over the Internet, but then is converted to the Time Division Multiplexing ("TDM") format used for traditional circuit-switched phone calls, and is delivered and terminated to a call destination on the Public Switched Telephone Network ("PSTN"). PSTN-IP traffic follows the opposite call flow. An example would be someone with a cable modem using an Internet phone device, or

[22] This includes, for example, ITR Issue 18 and IC Issue 2.

Internet phone software, to make and receive phone calls through her computer to the landline phones of her friends or relatives.

The issue before the Commission is the proper intercarrier compensation treatment of IP-PSTN traffic that is interexchange in nature; that is, IP-PSTN traffic where the originating end user and the terminating end user are located in different local exchanges. The FCC is currently considering precisely this issue in its *IP-Enabled Services NPRM*.[23] Both parties assert that, until the FCC issues its new order, the Commission should preserve the status quo for such traffic,[24] and both parties claim that their proposed contract language does this. Obviously, one of the parties is wrong. Ultimately, this is a legal issue, and it boils down to one question: what is the status quo with respect to interexchange IP-PSTN traffic?

The regulatory status quo for interexchange traffic is clear: access charges apply to such traffic, with a single, narrow exception (the FCC's "ESP exemption"). Because the ESP exemption does not apply to interexchange IP-PSTN traffic, access charges, rather than reciprocal compensation (or any other compensation arrangement), apply to such traffic, as SBC's language provides. Indeed, that is why Level 3 has pending before the FCC a petition asking the FCC to *forbear* from applying its access charge rules to IP-PSTN traffic.[25] Level 3's proposal here to subject IP-PSTN traffic to reciprocal compensation, on the other hand, represents a radical departure from existing law, and must be rejected.

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[23] 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*").

[24] Staff witness Zolnierek notes that the pending FCC decision "will resolve at least part of these issues, if not all of these issues (Tr. (Oct 10, 2004) at 622), and anticipates that the ICC should know more about the FCC decision by March, 2005 (*id*. at 619).

[25] *Petition for Forbearance Under 47 U.S.C. § 160(c)*, 19 FCC Rcd. 4863, WC Docket No. 03-266 (filed by Level 3 on Dec. 23, 2003).

The FCC's existing rules require that "[c]arrier's carrier [*i.e.*, access] charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b). IP-PSTN calls "use local exchange switching facilities," and thus access charges apply to that traffic when it is interexchange in nature. Level 3 makes much of its assertion that VoIP services are "interstate information services," but, even if Level 3 is correct, that merely confirms that reciprocal compensation does not apply to IP-PSTN traffic. FCC Rule 701(b)(1) provides that reciprocal compensation does not apply to "traffic that is interstate or intrastate exchange access, *information access*, or exchange services for such access." Instead, Section 251(g) of the Act preserves the "access regimes applicable to this traffic." *ISP Remand Order*, ¶ 37.

That IP-PSTN traffic uses IP technology for part of the call is irrelevant. The rules requiring access charges for interexchange traffic make no distinction and contain no limitations based on the technology used to deliver traffic to or from the PSTN. Rather, Rule 69.5 requires access charges for interexchange carriers that "use local exchange switching facilities." 47 C.F.R. § 69.5(b). For instance, wireless traffic that originates or terminates on the PSTN is still subject to access charges if it is interexchange in nature. Similarly, IP traffic that originates or terminates on the PSTN is still subject to access charges if it is interexchange in nature. And this makes perfect sense. Such traffic makes use of the PSTN and "local exchange switching facilities" on the "PSTN-side" of the call (either originating or terminating) just like a traditional circuit-switched interexchange phone call, and just like a wireless interexchange call, and thus should be subject to the same access charges. As the FCC stated in its *IP-Enabled Services NPRM* (¶ 61), "As 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."[26]

Level 3 suggests that IP-PSTN traffic should not be subject to access charges because the enhanced service provider ("ESP") exemption applies. Level 3 is wrong. Under the narrow ESP exemption, in certain circumstances "enhanced service providers are treated as end users for purposes of [the FCC's] access charge rules," and thus pay end user charges under FCC Rule 69.5(a) rather than carrier's carrier charges (*i.e.*, access charges) under FCC Rule 69.5(b). *Northwestern Bell Order*, ¶ 21.[27] But "[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers." *Id.* Level 3 is not an ESP, but is an interexchange carrier that serves ESP end user customers. Thus, under the ESP exemption, Level 3's ESP customers may not have to pay access charges, but Level 3 still does. Indeed, Level 3 witness Hunt admitted on cross-examination that Level 3 is not an ESP, but a local exchange carrier that has ESPs as customers. Tr. at 181-182.

Moreover, even if Level 3 were an ESP, the ESP exemption still would not apply to IP-PSTN traffic. That exemption applies only to an ESP's use of the PSTN *as a link between the ESP and its subscribers*. A traditional (non-VoIP) ESP-bound call uses the PSTN only as a link between an end user and its ESP to obtain access to the ESP's information service (*e.g.*, for Internet access). The FCC exempted ESPs from access charges for such calls, where the calls

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[26] Level 3 witness Hunt effectively acknowledged that the "IP-enabled" traffic that L3 contends should be exempt from access charges is functionally equivalent to access traffic, because it originates in one state, is transported over long distances by Level 3, and is handed off to SBC in Illinois for termination to an end user. *See* Tr. (Oct. 18, 2004) at 150-153.

[27] Memorandum Opinion and Order, *In re Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986 (FCC rel. Oct. 5, 1987) ("*Northwestern Bell Order*").

are delivered from the ESP's subscribers to the ESP's "location in the exchange area." *MTS/WATS Market Structure Order*, ¶ 78.[28] As the FCC subsequently described its ESP exemption, that exemption carves ESPs out from the access charge obligation when they "use incumbent LEC networks *to receive calls from their customers*." *Access Charge Order*, ¶ 343 (emphasis added).[29] 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 a connection between an ESP 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 "PSTN-bound" 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" (*Access Charge Order*, ¶ 343), but uses the PSTN to *terminate* calls from their customers to *non*-customers in other exchanges (IP-PSTN traffic), or to receive calls from *non*-customers in other exchanges (PSTN-IP traffic), just like traditional long distance telephone calls. In short, the FCC's limited ESP exemption simply does not apply to these VoIP services.

Finally, a brief word about Level 3's over-the-top rhetoric on this issue. Contrary to the impression Level 3 attempts to leave, SBC is not suggesting that IP-PSTN services be made subject to traditional common carrier regulation, or that such services be subject to tariffing or

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[28] Memorandum Opinion and Order, *MTS and WATS Market Structure*, CC Docket No. 78-72, 97 FCC 2d 682 (1983) ("*MTS/WATS Market Structure Order*").

[29] First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997) ("*Access Charge Order*").

pricing or quality of service regulation. Instead, SBC's position is that, when it comes to access charges, this traffic should be treated in the same manner as any other interexchange traffic. A comparable example is wireless traffic, which is essentially unregulated but is still subject to access charges if it is interexchange in nature. Wireless traffic has not received any special exemption from access charges, yet has thrived. And Level 3's suggestion that VoIP services will somehow be thwarted merely because such traffic is subjected to the *same* compensation rules that apply to other interexchange traffic, including circuit-switched traffic and wireless-PSTN traffic, is meritless.

The Commission should reject Level 3's attempt to gain an unfair advantage by evading existing intercarrier compensation rules. 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." *Access Avoidance Order*, ¶ 18. 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.

In short, the existing FCC rules require the application of access charges to IP-PSTN traffic, and 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 Level 3's proposed language emphatically does not.

II. DISCUSSION OF THE CONTRACT LANGUAGE ISSUES

A. GT&C ISSUES

GT&C ISSUE 1: SHOULD THE ASSURANCE OF PAYMENT REQUIREMENTS BE STATE-SPECIFIC OR STATE-INTERDEPENDENT?

ICA Reference: GT&C § 7.2

Generally, CLECs receive products and services from SBC pursuant to their interconnection agreements, are subsequently billed for those products and services, and – if all goes well – pay for them. Because there is a significant gap between the time when the CLECs receive the services and the time when they are required to pay for them, the CLECs are, in effect, buying from SBC on credit. SBC Ex. 4.0 (Egan Direct) at 4. Like practically any other class of purchasers, some CLECs are sound credit risks and some are not. And SBC cannot afford to extend credit to unsound credit risks. Since 2001, SBC ILECs have lost approximately $200 million to CLECs that have failed to pay their undisputed bills under interconnection agreements. *Id*.

To minimize the losses it incurs when CLECs do not pay their bills, each CLEC that has not demonstrated that it is a sound credit risk should be required to provide an assurance of payment – *i.e.*, a deposit – so that SBC will know there is money on hand to cover outstanding billed amounts in the event the CLEC becomes unable to pay or otherwise fails to pay its undisputed bills. *Id*. at 4-5. Level 3 has agreed to provide a deposit for that purpose, but the parties disagree about some of the particulars.

Section 7 of the General Terms and Conditions portion of the interconnection agreement covers these assurances of payment. It begins by setting forth, in section 7.2, four circumstances

under which SBC may request a deposit from a CLEC. Most of the disagreements between Level 3 and SBC concerning section 7 (namely, GT&C Issues 1, 2, 3 and 4) concern the details of those circumstances. Section 7 then goes on to address – in language that contains no disputes – such matters as the form of the deposit (section 7.3); the accrual of interest on the deposit (section 7.5); and the circumstances under which SBC can draw on the deposit (section 7.6). Then, section 7.8 provides that if SBC makes a request for an assurance of payment that is in accordance with the terms of section 7, SBC is not obliged to provide services to the CLEC until the assurance of deposit is forthcoming. The parties have one disagreement about section 7.8, which is the subject of GT&C Issue 5.

The question presented by Issue GT&C 1 is whether the assurance of payment requirements should be state-specific or state-interdependent. This issue arises out of the fact that Level 3 and SBC will have interconnection agreements in each state in SBC's 13-State service area, and each interconnection agreement will include assurance of payment provisions. Throughout section 7.2, which sets forth the circumstances under which SBC can request a deposit from Level 3, Level 3 proposes to add phrases like "in that State" and "for that individual State," so that SBC would be permitted to request a deposit from Level 3 only in the individual state or states where the circumstances pertained. For example, subsection 7.2.3 allows SBC to request a deposit if Level 3 fails to pay its bills, but Level 3 proposes to allow SBC to request a deposit only in the state (or states) where Level 3 fails to pay.

Level 3's proposal to immunize itself in most of SBC's service territory from the consequences of its conduct in one or two states is unreasonable. If a customer bounces a check at a Sears in Ohio, would the customer expect Sears to be wary of that customer only in Ohio? Of course not. If the customer's behavior in Ohio shows the customer is a bad credit risk, he is

just as bad a credit risk in Illinois. Accordingly, it is appropriate for SBC to request assurance of payment of the CLEC as a customer, and not on a state-specific basis, when the CLEC's credit worthiness is deficient.

Furthermore, Level 3 is overlooking a benefit that SBC's language gives Level 3, and is ignoring a corresponding burden that Level 3's own language would impose on Level 3. Just as credit-impairment is not state-specific, neither is being a non-credit-impaired customer. And under section 7.2.1, which provides that the CLEC need not make a deposit if the CLEC has established a good credit history with SBC, a customer that establishes good credit with SBC in one state is – under SBC's approach – excused from making a deposit in all states. Under Level 3's state-specific approach, however, a CLEC would have to establish good credit separately in each state it enters before it could be excused from the assurance of payment requirement. SBC's approach is superior in this regard, because it appropriately protects SBC from credit-impaired CLECs, but at the same time allows good-paying CLECs to avoid paying an initial deposit. Thus, SBC's proposed language strikes a fair balance between protecting SBC's financial interests and protecting the interests of good-paying CLECs, while Level 3's language would advance the interests of poor-paying, credit-impaired CLECs at the expense of good-paying CLECs. SBC Ex. 4.0 (Egan Direct) at 6-7.

SBC's proposed language in section 7.2 appropriately balances SBC's need to protect itself against the risk of non-payment – the risk that has cost SBC approximately $200 million in the last three years – and CLECs' understandable desire to not pay a deposit if no deposit is needed. Accordingly, Level 3's proposed language for GT&C section 7.2 should be rejected.

GT&C ISSUE 2: WHAT ARE THE APPROPRIATE CRITERIA FOR DETERMINING SATISFACTORY CREDIT AS OF THE EFFECTIVE DATE OF THE AGREEMENT?

ICA Reference: GT&C § 7.2.1

GT&C Issue 2 is narrower than the issue statement set forth above suggests. Agreed language in GT&C section 7.2.1 allows SBC to request an assurance of payment if Level 3 "has not already established satisfactory credit by having made at least twelve (12) consecutive months of timely payments to" SBC. Level 3 proposes to add to the end of section 7.2.1 the words, "(with no more than two (2) valid past due notices for undisputed amounts within that twelve (month) period)." In other words, Level 3's proposed language modification would require three or more non-payment notices before SBC could request assurance of payment based on Level 3's payment history.

As an initial matter, it is appropriate for CLECs who have not established satisfactory credit to be required to pay a deposit before they are allowed to receive services on credit. This is so as a matter of general good business practice, and especially so in the telecommunications industry in light of the high occurrence of payment defaults SBC has experienced with its CLEC customers. The basic criterion for establishing satisfactory credit in section 7.2.1 is that the CLEC must have made twelve (12) consecutive months of timely payments to SBC. The twelve-month period was chosen because if a customer pays its bills on time for a twelve-month period, it has demonstrated an ability and a willingness to pay throughout an entire business cycle. SBC Ex. 4.0 (Egan Direct) at 11.

Level 3's counter-proposal is unreasonable, and not in harmony with sound business practice. A customer that can be counted on to pay its bills to the point that it should be permitted to buy substantial amounts of products and services on credit without making a deposit simply does not get two late payment notices a year. *Id*. at 11-12. To the extent that Level 3's

concern may be that it might receive a late payment notice from SBC in error, SBC's language already takes care of that possibility, because all it calls for is twelve months timely payments "for undisputed charges." In other words, SBC's language does not count late payment notices – it is only Level 3's proposed language that introduces the concept of late payment notices – so if it should happen that SBC does send Level 3 a late payment notice in error, or under circumstances where Level 3 was disputing the bill, that would not have any effect on Level 3's establishment of good credit history under section 7.2.1, because Level 3, notwithstanding SBC's (hypothetically erroneous) late payment notices, would still have made twelve months timely payments of undisputed bills.

Level 3 contends that its proposal "merely requires SBC to take into account Level 3's positive past payment history." Level 3 Ex. 4.0 (Mandell Direct) at 9. But that is not an accurate depiction of the competing contract language proposals. SBC's version of section 7.2.1 takes fully into account Level 3's positive past payment history by excusing Level 3 from making a deposit if it in fact has a positive payment history. Level 3's proposal attempts to water down the meaning of "positive payment history" by redefining it to include a history where Level 3 has received two past due notices. That is not appropriately regarded as a positive payment history. Therefore, Level 3's proposed additional language should not be included in section 7.2.1.

GT&C ISSUE 3: HOW SHOULD THE ICA DESCRIBE THE IMPAIRMENT THAT WILL TRIGGER A REQUEST FOR ASSURANCE OF PAYMENT?

ICA Reference: GT&C § 7.2.2

Agreed language in section 7.2.2 allows SBC to request a deposit from Level 3 if there is an "impairment of the established credit, financial health or credit worthiness of Level 3."[30] The provision goes on to say that, "Such impairment will be determined from information available from financial sources, including but not limited to Moody's, Standard and Poor's and the Wall Street Journal," and it then describes the particular types of financial information that can be considered. Thus, the parties have agreed that SBC may request a deposit from Level 3 if Level 3's credit is impaired, as indicated by specified types of financial information reported in reliable financial sources. The parties have two disagreements, however.

First, Level 3 proposes to add language that would require the impairment to Level 3's credit, financial health, or credit-worthiness to be "**significant and material**" in order for SBC to be entitled to request a deposit. That language should be rejected, because it is an invitation to disputes. It is absolutely unclear what "significant and material" means, or how the parties (or the Commission, if the matter were brought here) would measure whether an impairment to Level 3's credit is "significant and material." Thus, if Level 3's language were adopted, it is practically guaranteed that in any instance where SBC requested a deposit pursuant to section 7.2.2, Level 3 would dispute the request – or at least could dispute the request – by claiming that the impairment reported in the financial sources was not significant and material. (And in any such dispute, Level 3 would probably argue that SBC, as the party seeking the

[30] Materials the parties filed early in the proceeding indicated that the words "credit, financial health, or credit worthiness" were disputed, but those words are now agreed.

deposit, had to bear the burden of proving significance and materiality.) The whole purpose of the deposit requirement is to get funds on deposit before a financially shaky CLEC runs up large bills that may never get paid, and Level 3's proposal would defeat that purpose.

SBC's objection to Level 3's language is *not* that SBC wants to be in a position to demand a deposit as a result of trivial or immaterial impairments to Level 3's credit. Indeed, section 7.2.2, even without Level 3's proposed insert, would almost certainly not allow SBC to do so because the reliable financial reporting services identified in section 7.2.2 do not report insignificant or immaterial credit impairments – at least as SBC understands those terms. It is essential, though, that SBC not be required to demonstrate the significance and materiality of an impairment as a pre-condition to obtaining a deposit. Moreover, one of Level 3's themes in connection with section 7 is that the criteria for requesting an assurance of payment should be concrete, clearly-defined and objective. Section 7.2.2, in the form SBC proposes, meets that test because it assesses creditworthiness based on the corporate credit ratings issued by independent credit rating agencies such as Moody's or Standard & Poor's. Level 3's proposal to introduce vague and ambiguous notions of "significance" and "materiality," on the other hand, would undermine the concreteness and objectivity of the criteria in section 7.2.2

The parties' second disagreement concerning section 7.2.2 begins with language in section 7.2.2 that provides that SBC may request a deposit if "at any time on or after the Effective Date" there has been impairment in Level 3's credit, financial health, or credit-worthiness. This gives rise to the obvious question: impairment as compared to when? Level 3 proposes that the baseline date be the Effective Date of the interconnection agreement, so that a deposit could be requested only if Level 3 suffered an impairment of credit after the Effective Date. SBC, on the other hand, proposes that the baseline date be August 1, 2004 – which is a

date chosen because it was in the midst of the parties' most recent negotiations over this interconnection agreement and was approximately when SBC had its most recent opportunity to check on Level 3's credit.

Level 3's proposal is inconsistent with contract language to which Level 3 has already agreed. If Level 3's proposed date were adopted, section 7.2.2 would say that SBC could request an assurance of payment if "at any time ***on or after*** the Effective Date," Level 3's credit was impaired "as compared to its status on ***the Effective Date***." Obviously, it is impossible for Level 3's status on the Effective Date to be impaired as compared to Level 3's status on the Effective Date. Thus, Level 3's proposal leads to an absurdity, and should be rejected.

Differently put, the first few words of section 7.2.2 clearly reveal an understanding that there can be an impairment not only *after* the Effective Date, but *on* the Effective Date as well. And the only way one can discern an impairment *on* the Effective Date is by looking back to a point in time *before* the Effective Date. And that makes sense, because SBC cannot know today what Level 3's financial condition will be on the Effective Date; the most it can know is Level 3's financial condition today. And if Level 3's financial condition suffers an impairment between today and the Effective Date, SBC should be allowed to request a deposit. That is what SBC's language seeks to accomplish, but as the best available proxy for "today," it uses a date reasonably close to (and functionally equivalent to) today – August 1, 2004, when the parties last negotiated the language at issue.

GT&C ISSUE 4: **IN ORDER FOR FAILURE TO TIMELY PAY A BILL TO TRIGGER A REQUEST FOR ASSURANCE OF PAYMENT, WHICH PART(IES) MUST COMPLY WITH THE PRESENTATION AND DISPUTE RESOLUTION REQUIREMENTS OF THE AGREEMENT AND TO WHAT EXTENT?**

ICA Reference: GT&C § 7.2.3

There are two disagreements concerning section 7.2.3, and both arise out of Level 3 proposals to add to the language on which the parties have agreed. Agreed language in section 7.2.3 permits SBC to request a deposit if Level 3 fails to pay a bill, except to the extent the bill is "subject to a good faith, bona fide dispute" as to which Level 3 has "complied with all requirements set forth in Section 9.3," which prescribes the procedure for disputing a bill. Level 3 proposes two additions to the agreed language. First, Level 3 proposes to add the word "substantially" before "complied," so that Level 3 would only have to "substantially comply" with the requirements of section 9.3. Second, Level 3 proposes to add the following at the end of section 7.2.3: "provided that [SBC] has likewise substantially complied with all requirements of this Agreement with respect to presentation of invoices and dispute resolution" – so that SBC could not request a deposit from Level 3 after a Level 3 failure to pay a bill unless SBC has substantially complied with those requirements. SBC opposes both additions proposed by Level 3.

Level 3's proposal that it be required only to "substantially comply," rather than "comply" with the requirements of section 9.3 is plainly unreasonable. Just as the parties are required to comply with any other provisions of the ICA, so Level 3 should be required to comply with section 9.3, not just "substantially" comply with it. Like Level 3's proposal to insert the words "significant and material" into section 7.2.2, Level 3's proposal to insert "substantially" here would introduce an element of vagueness and uncertainty into the parties'

dealings that would promote disputes later. Sections 9.3.1, 9.3.2, and 9.3.3 provide reasonable language, as evidenced by Level 3's agreement to those provisions, for the non-paying party that wishes to dispute a bill to (1) pay all undisputed charges; (2) notify the Billing Party in writing which portion(s) of the unpaid charges it disputes, including necessary details to investigate the dispute; (3) pay all disputed amounts into an interest bearing escrow account; and (4) furnish written evidence to the Billing Party that the Non Paying Party has established an interest bearing escrow account and deposited a sum equal to the disputed amounts into that account. Having agreed to these requirements, Level 3 should be required to comply with them, not to "substantially comply" with them, just as both parties are required to comply with the other provisions of the ICA.

Level 3's second proposal is to add language that would allow SBC to request a deposit from Level 3 after Level 3 fails to pay a bill only if SBC complied with the requirements of the Agreement concerning presentation of invoices and dispute resolution. Level 3's proposal has a legitimate purpose, but it is far broader than it needs to be – so broad, in fact, that it must be rejected because it would undermine section 7.2.3. Recall that section 7.2.3 permits SBC to request a deposit from Level 3 if Level 3 fails to pay a bill, except to the extent that Level 3 has raised a bona fide dispute concerning the bill pursuant to the procedures set forth in section 9.3. The concern that Level 3's proposed language is intended to address, according to Level 3's witness (*see* Level 3 Ex. 4.0 (Mandell Direct) at 12), is that Level 3 must receive sufficient notice and have an opportunity to correct a potential problem. In other words, Level 3 does not want to be required to make a deposit in a situation where it has failed to pay a bill and has also failed to dispute the bill pursuant to the procedures in section 9.3 because of a failure on SBC's part to present the bill properly or to adhere to its own counterpart obligations under section 9.3.

That is a legitimate concern, and SBC would have accepted a Level 3 proposal that dealt with it appropriately. For example, SBC could have accepted a proposal to the effect that SBC could not request a deposit from Level 3 if Level 3's failure to pay a bill or dispute the bill was *caused by* or *resulted from* a failure by SBC to comply with its obligations with respect to invoicing or dispute resolution. The language that Level 3 has proposed goes far beyond that, however. It would prohibit SBC from requesting a deposit from Level 3 if SBC did not comply – apparently at any time, and not necessarily in connection with the episode at issue – "with *all* requirements of this Agreement with respect to presentation of invoices and dispute resolution." Under Level 3's language, in other words, if SBC ever, at any time, failed to substantially comply with one of those requirements, SBC could never request a deposit from Level 3 based on a Level 3 failure to pay a bill, even if there were no connection between SBC's failure and Level 3's failure. That makes no sense and would, if SBC ever slipped up with respect to the presentment of an invoice, eliminate SBC's rights under section 7.2.3. Accordingly, Level 3's proposal must be rejected.

In sum, the agreed language in section 7.2.3 sets forth reasonable provisions for payment and dispute of bills, and should be accepted without either of the additions proposed by Level 3.

GT&C ISSUE 5: SHOULD LEVEL 3 BE PERMITTED TO DISPUTE THE REASONABLENESS OF AN SBC REQUEST FOR ASSURANCE OF PAYMENT?

ICA Reference: GT&C §§ 7.8 and 7.8.1

Level 3's proposed language in GT&C Section 7.8 would allow it to dispute an assurance of payment request based on a contention that the request was not "reasonable." On the surface, that might appear to be a reasonable proposal, but upon consideration, it is not. SBC can request an assurance of payment only if certain precise criteria – spelled out in detail in sections 7.2.1, 7.2.2, 7.2.3 and 7.2.4 – are met. If those criteria are met, SBC is permitted to request an

assurance of payment. And if they are met, Level 3 cannot properly be permitted to dispute the request on the grounds that it is not "reasonable." By definition, if the criteria are met, the request is appropriate. To add on top of that a vague additional requirement that the request, in addition to meeting the specified criteria, must also pass an undefined "reasonableness" test would accomplish nothing except to allow Level 3 to dispute any request it chose. Level 3's proposal here makes no more sense than would a proposal that SBC's bills, in addition to being accurate and reflecting the prices called for by the contract, must also be "reasonable."

Level 3 asserts that all it is asking for is "the opportunity to raise a good faith bona fide dispute with respect to such SBC demand before SBC can unilaterally impose its sanctions upon Level 3." Level 3 Ex. 4.0 (Mandell Direct) at 14. But that is not what Level 3's language says – what it says is that Level 3 can challenge the *reasonableness* of a demand for a deposit. To the extent that Level 3 wants to raise a bona fide dispute with respect to an SBC request for a deposit, Level 3 can do so *without* the language it is proposing. But the basis of the dispute must be that the criteria set forth in sections 7.2.1, 7.2.2, 7.2.3 and 7.4 have not been met – not that the request is "unreasonable." For example, if SBC requests a deposit pursuant to section 7.2.3 on the ground that Level 3 failed to timely pay a bill, Level 3 can dispute the request by asserting (if it has a basis for doing so) that it was not untimely in its payment, or that it was disputing the bill. But if the conditions of section 7.2.3 are met, Level 3 should not be allowed to dispute the request for deposit on the ground that even so, the request is unreasonable. The way for Level 3 to satisfy itself that the ICA allows SBC to request a deposit only when the circumstances warrant such a request is to make sure that the criteria set forth in sections 7.2.1 through 7.2.4 are

themselves reasonable – and Level 3 is doing exactly that by arbitrating the language in those provisions.[31]

GT&C ISSUE 6: UNDER WHAT CIRCUMSTANCES MAY SBC DISCONNECT SERVICES FOR NONPAYMENT?

ICA Reference: GT&C § 8.8.1

Section 8.8.1 provides, in agreed language, that if a billing dispute is resolved in favor of the billing party, the billed party's failure to pay the amounts determined to be owing within a specified time "shall be grounds for termination of the . . . products and services provided under this Agreement." There then follows agreed language that states: "provided, however, that the Billing Party shall comply then with all procedures set forth under this Section 8 regarding discontinuance of service and/or termination of this Agreement."[32] GT&C Issue 6 concerns Level 3's proposal to add to that proviso the words "and otherwise set forth in applicable law." Thus, the language in question is as follows, with Level 3's proposed language bolded and underlined:

> provided, however, that the Billing Party shall comply then with all the procedures set forth under this Section 8 **and otherwise set forth in applicable law** regarding discontinuance of service and/or termination of this Agreement.

Level 3's proposed overlay of "applicable law" in this provision is unacceptable for the same reason as its proposed invocation of the same vague term elsewhere in the ICA. The purpose of the Agreement is to set forth in detail the parties rights and obligations in light of

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[31] Nominally, there is another dispute concerning section 7.8. As SBC witness Egan explained (SBC Ex. 4.0 (Egan Direct) at 24-25), Level 3, for reasons that Level 3 has not stated and that SBC cannot imagine, has indicated on the DPL that it opposes a sentence proposed by SBC that works in Level 3's favor. That sentence should be included in the ICA for the reasons set forth by Mr. Egan.

[32] Materials the parties filed early in the proceeding indicated that language as disputed. It is not disputed; Level 3 proposed it, and SBC accepted it.

current law. To the extent that there is any pertinent "applicable law," Level 3 should have brought that law to the Commission's attention in this proceeding, and should have advocated its express inclusion in the Agreement. Approval of Level 3's proposed language would be an invitation to disputes later about what is and what is not "applicable law."

SBC opposes vague and confusing contract terms, and adding a vague reference to "applicable law" in this instance qualifies. This ICA should be as clear as possible so that both parties fully understand their obligations, and if Level 3 wanted to turn into a contract obligation a requirement of law with which SBC is already required to comply, Level 3 should have said what that requirement is. It did not, however, and the Commission should reject Level 3's request to add "applicable law" to section 8.8.1.

Staff appears to agree with SBC on this point. As we discuss below in connection with GT&C Issue 7, Staff witness Omoniyi, after summarizing the parties' positions on Issues 6 and 7, recommends "that the Commission should accept SBC's position, with some modification to accommodate Level 3's position 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 at 11. Although Mr. Omoniyi does not explicitly address Level 3's proposed "applicable law" language, it appears, since he recommends that the Commission adopt SBC's proposal with certain specific modifications – none of which pertains to this language – that Staff agrees with SBC that the reference to "applicable law" should not be included in the Agreement. Also, this conclusion is consistent with Mr. Omoniyi's insistence that the bill collection processes be "carefully articulated" (Staff Ex. 2.0 at 12) and that the provision governing termination of services should "offer both parties certainty" (*id*. at 14). A vague reference to "applicable law" would undermine those goals, and should not be permitted.

GT&C ISSUE 7: **SHOULD LEVEL 3'S FAILURE TO PAY UNDISPUTED CHARGES ENTITLE SBC TO DISCONTINUE PROVIDING ALL PRODUCTS AND SERVICES UNDER THE AGREEMENT, OR ONLY THE PRODUCT(S) OR SERVICE(S) FOR WHICH LEVEL 3 HAS FAILED TO PAY UNDISPUTED CHARGES?**

ICA Reference: GT&C § 9.2

The disputed language in section 9.2 embodies three disagreements, only one of which is identified in the statement of the issue set forth above. The other two are (i) whether the provision should say that a failure to pay undisputed charges "shall" be grounds for disconnection or "may" be grounds for disconnection; and (ii) whether Unpaid Charges (as defined) must be paid within 30 calendar days or ten business days following receipt of a notice of unpaid charges.

"May" vs. "shall." Section 9.2 should say that a failure to pay undisputed bills "shall be" grounds for disconnection, not that it "may be" grounds for disconnection. The use of "may" would make no sense, because it raises the unanswered question, "Depending on what?" Assume that Level 3 fails to pay undisputed charges, and that SBC then undertakes to terminate its provision of services to Level 3 exactly as prescribed in the remainder of section 9.2. Is Level 3 permitted to say, "No, SBC, you cannot do that, because our failure to pay only 'may' be grounds for disconnection?" Of course not – in part because if Level 3 were permitted to dispute SBC's right to disconnect on that ground, there is no way (either in the proposed contract language or otherwise) to determine when the failure to pay ***is*** grounds for disconnection.

The only intent of section 9.2 that makes sense is that a failure to pay ***is*** – *i.e.*, "shall be" grounds for disconnection. The use of that term does not, of course, mean that disconnection will be automatic if Level 3 failed to pay undisputed charges, but only that under this Agreement nonpayment is in fact grounds for disconnection under the circumstances described. (The way

one would say that disconnection is automatic is not that a failure to pay shall be *grounds for* disconnection, but that service "shall be disconnected" if there is a failure to pay.)

Staff agrees with SBC on this part of the issue. *See* Staff Ex. 2.0 (Omoniyi) at 14 ("[T]he word 'shall' as proposed by SBC should be used to offer both parties certainty on the consequences of undisputed charges. In contrast, any provision that states that the disconnection 'may' be undertaken . . . would likely lead to confusion and disagreement . . .").

Discontinuation of all services, rather than only unpaid services. SBC and Level 3 have agreed to language in GT&C section 8.1 that provides for remittance in full of all bills rendered by thirty calendar days from the bill date or in accordance with the terms set forth in the applicable tariff. Thirty days allows sufficient time for Level 3 to review and pay any undisputed charges and deposit the disputed charges in an escrow account. If funds have not been received by the bill due date, a written notice of unpaid charges (first late notice) is sent requiring remittance of unpaid charges within ten business days (section 9.2), and, if payment is not made by then, a written demand letter (second late notice) is sent to the non-paying party for payment within 10 business (section 9.5.1) days before SBC begins (1) suspending acceptance of service/product orders, (2) suspending completion of any pending service/product order and/or (3) discontinuing providing Interconnection, Resale Services, Network Elements, Collocation, functions, facilities products or services under the ICA. In sum, under SBC's proposed language, Level 3 would have approximately sixty (60) days from the invoice date to analyze and determine if there is a dispute with an invoice and pay the undisputed portion of the bill. Sixty days is ample time to review and pay or dispute the bill.

Against that background, there are two reasons for allowing SBC to terminate all services to Level 3 if Level 3 fails to pay its undisputed bills: First, the simple fact of the matter is that if

Level 3 is failing to pay its undisputed bills, it is failing to pay its undisputed bills. The reason for the termination of service is that if a customer is failing to pay without any valid excuse, the risk that that customer will continue to fail to pay is very high, so it would be commercially irrational for the seller, SBC in this case, to continue to provide services. It makes no difference what services the customer fails to pay for. (If a customer of Sears failed to pay for a couch, one would not expect Sears to discontinue selling furniture to that customer but to continue to sell him automotive products.)

Second, Level 3's proposal is unworkable, because it would limit treatment options to individual services (presumably individual Billing Account Numbers). This scheme is administratively burdensome and would also invite mischief on the part of the CLEC, which could transfer services between different services in order to avoid disconnection. For example, resale end users could be converted to UNE lines, which would cause the same services to be billed under different accounts. SBC Ex. 4.0 (Egan Direct) at 31.

Staff witness Omoniyi recommends that SBC be permitted to disconnect only the particular services for which Level 3 does not pay, but his rationale is flawed. Mr. Omoniyi's stated rationale is that to permit SBC to discontinue all services would be "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." Staff Ex. 2.0 at 13. The concern about confusion is unfounded. Mr. Omoniyi does not say how the confusion would arise, so the Commission (and SBC) are left to guess. It should go without saying, however, that if SBC's proposed language is adopted and Level 3 fails to pay its bills, SBC is not going to precipitously pull the plug on Level 3. Rather, as is always the case before SBC even begins to think about invoking drastic

remedies, there would be extensive communication between SBC and Level 3, above and beyond that which is expressly required by the interconnection agreement. SBC's goal is to get paid, not to shut off customers' service. . As part of those communications, SBC would make very clear exactly what services it actually had in mind disconnecting if Level 3 failed to pay, and when. There would be no possible confusion. SBC Ex. 4.1 (Egan) at 4.

Mr. Omoniyi also expresses concern that if the agreement allows SBC to discontinue all of Level 3's services, Level 3 customers who had nothing to do with the particular services for which payment was not made would be impacted. This misses the point. After all, *none* of Level 3's customers is responsible for the fact that Level 3 has not paid its bills in the situation we are discussing. All of them are, presumably, paying their bills to Level 3 and have no reason to anticipate that because of a Level 3 failure to pay its bills, they may have to find another provider. (And if by chance some of Level 3's customers are not paying their bills to Level 3, there is no particular reason to think that those customers happen to be buying the particular Level 3 services that correspond with the services for which Level 3 is not paying SBC.) So, looking at it from the point of view of Level 3's customers, which is what Mr. Omoniyi is attempting to do, all of those customers are similarly situated. There is no rational basis for the line Mr. Omoniyi proposes to draw.

Finally, if, as may be the case, Mr. Omoniyi's underlying concern is simply that discontinuation of all services seems disproportionate to Level 3's non-payment for only some services, the Commission should not share that concern. The purpose of a contract provision that allows SBC to discontinue providing services to a CLEC that does not pay its bills is not to enable SBC to punish the CLEC. Rather, it serves two other purposes: First, it allows SBC to protect itself from loss by discontinuing sales on credit to a customer who, in the situation we are

discussing, SBC *knows for certain* is not credit worthy , because it is not paying its undisputed bills. Bear in mind that all services that SBC provides to Level 3 are provided on credit, with the hope and expectation that Level 3 will pay for them later. If Level 3 fails to pay its undisputed bills for some services, SBC should not be required to continue to provide Level 3 with *any* services on credit, because SBC has good reason to doubt that it will be paid. Second, SBC's entitlement to discontinue services provides the appropriate incentives to get a recalcitrant CLEC to pay its bills. If SBC can discontinue only those services for which the CLEC has not paid, a CLEC, upon deciding that it no longer wished to obtain certain services from SBC, could simply stop paying for those services and withhold payment indefinitely, secure in the knowledge that the most SBC could do would be to discontinue services the CLEC no longer wants. Instead, SBC should be in a position where it can, in that rare circumstance where a CLEC, with no excuse, fails to pay its undisputed bills after repeated urgings, tell the CLEC that all services will be discontinued if the CLEC does not pay.[33]

30 calendar days vs. ten business days. The period of time in question is the period within which a Non-Paying Party must remit all Unpaid Charges to the Billing Party following receipt of the Billing Party's notice of Unpaid Charges. "Unpaid Charges" are defined in section 9.2 as "*undisputed* charges billed . . . under this Agreement, including . . . any Late Payment charges or miscellaneous charges." The Billing Party's notice of Unpaid Charges is described in section 9.2 as a written notice that is sent to the Non-Paying Party, in the event that

[33] Mr. Omoniyi proposes, at pages 13-14 of his testimony, that the agreement should prohibit Level 3 from migrating services for which it has not paid to services for which it has paid. Mr. Omoniyi offers this suggestion as a way to address one of the concerns that underlies SBC's view that discontinuation of all services should be available as a response to non-payment for some. For the reasons discussed in the text, Mr. Omoniyi's proposal does not come close to addressing all of SBC's legitimate concerns; for example, it does not address the situation where a CLEC simply stops paying for a service it does not want. Thus, the Commission should adopt SBC's proposal as is, in which event Mr. Omoniyi's suggestion becomes moot.

payment for undisputed charges is not made, notifying the Non-Paying Party "that in order to avoid disruption or disconnection of . . . products and services," the Non-Paying Party must remit all Unpaid Charges to the Billing Party within the specified time – either thirty Calendar Days (Level 3's proposal) or ten Business Days (SBC's proposal).

As it considers each party's proposal, the Commission should bear in mind that in the situation at issue here, Level 3 initially had 30 days to pay its bill; failed to pay or dispute the bill; and SBC at some point thereafter is sending Level 3 a notice that it must pay the undisputed charges within a stated period or be at risk of a termination of service. In that scenario, ten business days – two full weeks – is ample time for Level 3 to make its already late payment.

Level 3 asserts that it needs "at least thirty days to perform the necessary internal analysis and audit to respond to the unpaid charges notice." Level 3 Ex. 4.0 (Mandell Direct) at 17. SBC disagrees. Level 3 *already* had thirty days (or more) to analyze the bill when it received it, and Level 3 determined it had no disagreement with the bill – that is why it did not dispute it. (Recall that what we are talking about here is a failure to pay *undisputed* charges.) Now, SBC is informing Level 3 that it needs to pay the bill that Level 3 has already analyzed and decided not to dispute. Level 3 simply does not need more than ten business days to pay an undisputed bill.

Likewise, Level 3 asserts (*id.*) that the period should be thirty days so that the parties can "thoroughly investigate the problem . . . , work together informally, and potentially avoid unnecessary litigation." Again, though, if there was a "problem" with the bill, the parties should be addressing it *before* SBC has occasion to send the notice letter. Furthermore, the ten business day period does not mean that SBC will automatically terminate service ten business days after sending the notice letter if Level 3 does not pay the undisputed bill. So, for example, if the parties are engaged in good faith discussions about the bill and are making progress toward a

resolution, SBC will – like any rational provider of services – continue to work toward that resolution rather than pulling the plug merely because it has a contractual right to do so. SBC Ex. 4.0 (Egan Direct) at 33.[34]

The Commission should resolve all three aspects of GT&C Issue 7 in favor of SBC.

GT&C ISSUE 8: WHAT IS A REASONABLE INTERVAL TO RESPOND TO NOTICE OF NON-PAYMENT IN THE MANNER REQUIRED UNDER THE AGREEMENT?

ICA Reference: GT&C § 9.3

Pursuant to GT&C section 8.1, remittance is due within thirty calendar days of each due date. Ideally, a party should have to provide notice of a billing dispute on or before the payment due date of the disputed charge. But SBC, in the spirit of compromise, offered Level 3 language whereby the Billed Party would not have to formally dispute charges until ten business days following the receipt of a collection notice. Level 3 proposes thirty days, which would give it sixty days from the invoice date within which to pay or dispute a bill. This is unacceptable, because it would create an incentive for Level 3 to delay the filing of billing disputes and this would increase the risk of default to SBC.

Level 3's contention that ten business days is not long enough to audit a bill (Level 3 Ex. 4.0 (Mandell Direct) at 19) is based on a misunderstanding of SBC's contract language. Ten business days may indeed be too short a time in order to properly audit a bill. However, when one considers that SBC's proposal actually would allow Level 3 thirty calendar days from the invoice date *plus* an additional ten business days to formally dispute the charges, it is difficult to

[34]. Mr. Omoniyi, at page 12 of his testimony, makes suggestions concerning the collection process. The Commission cannot properly act on these suggestions, for two reasons: First, they for the most part address matters that are not in dispute, and the Commission must confine itself to resolving the disagreements that the parties have set before it for arbitration. *See* 47 C.F.R. § 252(c) (4)(A). Second, the parties' agreed procedures already provide the specifics Mr. Omoniyi seems to be advocating.

understand why Level 3 is objecting to SBC's language. The Commission should resolve this issue in favor of SBC.

GT&C ISSUE 9: **(A) SHOULD ACCEPTANCE OF NEW ORDERS AND PENDING ORDERS BE SUSPENDED IF UNDISPUTED CHARGES ARE OUTSTANDING ON THE DAY THE BILLING PARTY HAS SENT A SECOND LATE PAYMENT NOTICE?**

(B) SHOULD THE BILLING PARTY BE PERMITTED TO DISCONNECT AND DISCONTINUE PROVIDING ALL PRODUCTS AND SERVICES UNDER THE AGREEMENT, OR ONLY THOSE SPECIFIC NETWORK ELEMENTS AND SERVICES FOR WHICH UNDISPUTED PAYMENT HAS NOT BEEN RENDERED?

ICA Reference: GT&C §§ 9.5.1, 9.5.1.1, 9.5.1.2, 9.6.1.1, 9.6.1.2, 9.7.2.2.

Issue 9(A). SBC's proposed language in section 9.5.1 of the GT&C's provides that if the Non-Paying Party breaches the ICA as specified in these sections, *i.e*. fails to: (a) pay any undisputed amounts, (b) file a bona fide dispute for amounts in dispute by the deadline provided in the first late payment notification, (c) pay the disputed portion of a past due bill into an interest-bearing escrow account, or (d) pay any revised deposit amount or make a payment in accordance with the terms of any mutually agreed upon payment arrangement, the Billing Party will, in addition to exercising any other rights or remedies, provide a second late payment notice/written demand to the Non-Paying Party for failing to comply. At the time of the sending of the second late payment notice, the Billing Party may suspend acceptance of any new orders and suspend completion of any pending orders. Level 3 opposes SBC's proposed language.

SBC's proposed language applies only in extreme cases of non-payment and comes into play only when a party fails to pay or dispute charges even after receiving a first late payment notice. It would be neither just nor reasonable to require SBC to continue providing ordering capability to a carrier that fails, after a written demand and without justification, to pay

undisputed charges for those services, and this part of the issue should therefore be resolved in favor of SBC.

Issue 9(B). Level 3 proposes that SBC only be allowed to disconnect the specific service(s) or product(s) for which Level 3 has failed to pay the undisputed amount. Level 3's proposal is unworkable because it would limit treatment options to individual services (presumably individual Billing Account Numbers). This scheme would be administratively burdensome for SBC and would also invite potential mischief on the part of Level 3, which could choose to transfer services between different services in order to avoid disconnection. For example, resale end users could be converted to UNE lines, which would cause the same services to be billed under different accounts. If Level 3 fails to pay any undisputed balances owed after receiving two late payment notices, SBC should be entitled to disconnect all the services provided to Level 3 under this Agreement.

GT&C ISSUE 10: SHOULD SBC'S LANGUAGE REGARDING INTERVENING LAW BE INCORPORATED INTO THIS AGREEMENT?

ICA Reference: GT&C §§ 21.1, 21.2, 21.3, 21.4

Level 3 criticizes SBC's proposed intervening law language on the ground that it "buries the Agreement into minutia that is not needed and will only lead to confusion as to the intended meaning." *See* Level 3 Position Statement on GT&C DPL. Level 3's criticism might be valid if the question were which party's proposal is better prose, for there is no question but that Level 3's proposal is more concise and readable. But the correct way to think about the issue is this: Assume that at some point after the ICA goes into effect, a potential disagreement arises concerning whether a certain legal development does or does not qualify as an intervening law event for purposes of section 21. In that scenario, which party's language is more apt to resolve the potential disagreement? The answer is that SBC's language is better suited to that purpose,

because it identifies with specificity many anticipated developments that would qualify for "change of law" treatment, and thus would dispose of many disputes that the parties otherwise might have – and Level 3 does not actually dispute the correctness or substance of any of SBC's language. Accordingly, SBC's proposed language should be adopted.

Even if the Commission rejects as overly detailed SBC's proposed language for subsections 21.1, 21.2, and 21.3, the Commission should approve subsection 21.4, which provides much needed specificity concerning the procedure that must be followed in the event of a change of law.

GT&C ISSUE 11: SHOULD LEVEL 3 BE ALLOWED TO ASSIGN OR TRANSFER THIS AGREEMENT TO AN AFFILIATE WITH WHOM SBC ALREADY HAS AN INTERCONNECTION AGREEMENT?

ICA Reference: GT&C § 29.1

GT&C Section 29.1 governs assignments and transfers of the ICA, by both parties. Most of the section is agreed. The exception is the following sentence, proposed by SBC and opposed by Level 3:

> ***Notwithstanding the foregoing, LEVEL 3 may not assign or transfer this Agreement (or any rights or obligations hereunder) to its Affiliate if that Affiliate is a party to a separate interconnection agreement with SBC-13STATE under Sections 251 and 252 of the Act.***

The reason Level 3 cannot be allowed to assign or transfer this ICA (or parts of this ICA) to its Affiliate if the Affiliate already has an interconnection agreement with SBC is straightforward: The Affiliate is bound by, and limited to, the rates, terms and conditions of *its* agreement for the term of that agreement.

Imagine, for example, that the Affiliate's interconnection agreement has a termination date of January 20, 2007. If the Affiliate were to approach SBC early in 2005 and demand

negotiation of a replacement agreement to take effect before January 20, 2007, SBC would be well within its rights if it refused. Notwithstanding SBC's general obligation under the 1996 Act to negotiate interconnection agreements with requesting carriers, SBC would be entitled to say that *this* requesting carrier must abide by the terms of its existing agreement, and has no right to insist on a replacement to take effect before January 20, 2007.

Similarly, if the Affiliate, instead of asking SBC to negotiate a replacement agreement, attempted to adopt the terms and conditions of another CLEC's existing interconnection agreement pursuant to Section 252(i) of the 1996 Act,[35] the Affiliate would not be permitted to do so, because it would be bound by the terms of its existing agreement for the remainder of its term. *See Global NAPS, Inc. v. Verizon New England, Inc.*, Nos. Civ.A.03-10437-RWZ, 02-12489-RWZ, 2004 WL 1059795 (D. Mass. May 12, 2004) (holding CLEC with existing arbitrated interconnection agreement was not entitled to opt into a difference agreement under Section 252(i)); *New England Tel. Co. v. Conn. Dept. of Pub. Util. Co.*, 285 F. Supp. 2d 252, 254 (D. Conn. 2003) ("An entering CLEC can *either* opt into an existing interconnection agreement between the [incumbent] LEC and another CLEC, *or* it can negotiate [and arbitrate] its own interconnection agreement" (emphasis added)).

For the same reasons, the Affiliate cannot take on by transfer or assignment, in this instance from Level 3, terms and conditions of an interconnection agreement different than the agreement it already has. The Affiliate must honor its agreement for the remainder of its term. Then, like any other carrier, the Affiliate can opt into Level 3's agreement with Level 3 if it

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[35] Generally under Section 252(i), SBC must "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier under the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

wishes. Accordingly, Level 3 cannot properly be properly be permitted to transfer or assign its interconnection agreement, in whole or in part, to its Affiliate that has a current agreement with SBC, and SBC's proposed language to that effect should be adopted.

B. GT&C DEFINITION ISSUES

GT&C DEF. ISSUE 1: SHOULD THE DEFINITION OF "ACCESS TANDEM SWITCH" BE LIMITED TO IXC-CARRIED TRAFFIC OR SHOULD IT INCLUDE INTRA-LATA TOLL TRAFFIC, SECTION 251(b)(5) TRAFFIC AND ISP-BOUND TRAFFIC?

ICA Reference: GT&C Definitions ("Access Tandem Switch")

The issue here is whether the definition of "access tandem switch" should be limited to IXC-carried traffic (as proposed by Level 3) or whether it should include IntraLATA toll traffic, Section 251(b)(5) traffic and ISP-bound traffic (as proposed by SBC). SBC's tandem switches are capable of handling many different traffic types – not just IXC-carried traffic. SBC Ex. 1.0 (Albright Direct) at 7-8, 79-90. Specifically, there are tandem switches throughout SBC's 13 state serving area that carry Intra-LATA toll traffic, section 251(b)(5) traffic, and ISP-bound traffic. *Id.* at 7-10, 79-90. This is demonstrated in the table provided on pages 9-10 of Mr. Albright's testimony, which identifies, by LATA, the types of traffic each SBC tandem handles in this state. The definition of "access tandem switch" should refer to all the types of traffic that are capable of being handled by SBC's access tandems – not just IXC-carried traffic.

Furthermore, it is not enough to include in the ICA only a definition of the term "access tandem." SBC Ex. 1.0 (Albright Direct) at 7-10, 79-90. Access tandems handle specific types of traffic and often do not handle other types of traffic. *Id*. For example, SBC's "Local Only" tandem switches handle 251(b)(5) non-IntraLATA local traffic and ISP-bound traffic, but not IXC traffic (*id.* at 85-87); and SBC's "Local/Access" tandem switches handle Section 251(b)(5)/IntraLATA and IXC' carried traffic, but not ISP-bound traffic (*id.* at 83-84).

The ICA should define each type of tandem switch in SBC's network (local/access tandem switch, local/IntraLATA tandem switch, local only tandem switch, and local tandem switch) in accord with the type of traffic the tandem is provisioned to carry, as proposed by SBC in GT&C Definition Issues 9, 11, 12, and 14.

In parallel proceedings in Indiana, Level 3 has agreed to route only local traffic to local-only tandem switches precisely because those tandem switches are provisioned to handle only that type of traffic. Indiana Level 3 Ex. 10 (Wilson Rebuttal) at 7-8. Level 3's commitment only makes sense – and can only be implemented – if the interconnection agreement contains definitions for local-only and other types of tandem switches. Moreover, and as explained in GT&C Definition Issues 9(a), 11(a), 12(a), and 14(a), the ICA itself repeatedly refers to the different types of tandem switches instead of referring generically to "access tandem switches" in both agreed to and disputed provision – definitions for each type of tandem switch are therefore appropriate. SBC Ex. 1.0 (Albright Direct) at 79-90.

Level 3 does not claim that SBC's proposed definitions are wrong; rather, Level 3 claims they are unnecessary. However, this is not true given that (1) Level 3 itself has agreed to route only local traffic to local-only tandem switches and (2) the parties mention the various types of tandem switches in disputed and agreed to provisions of the ICA. Level 3 proposes that the definitions for the various types of tandem switches proposed by SBC (see GT&C Definition Issues 9, 11, 12, and 14) be replaced with one definition of the term "tandem switch" as follows: "[A] switching machine within the public switched telecommunications network that is used to connect and switch trunk circuits between and among offices switches. . . . " Level 3 Ex. 2.0 (Wilson Direct) at 49. That proposal should be rejected for all the reasons explained above.

SBC may not have certain types of tandem switches in some states. But definitions for such absent switches still need to be included in the interconnection agreement because, if in the future SBC chooses to deploy a particular tandem switch that it currently does not have, that tandem switch will be provisioned to carry only the type of traffic intended for it – again, for example, "Local Only" tandem switches would be provisioned to handle 251(b)(5) non-IntraLATA local traffic and ISP-bound traffic, but not IXC traffic (*id.* at 85-87).

Notably, in the Proposed Arbitration Decision in the MCI/SBC Illinois arbitration (at 77-78), the hearing examiner recommended that the Commission adopt SBC's proposed definitions of "access tandem switch," "local tandem switch," "local/access tandem switch," and "local/intraLATA tandem switch," because "there is a need to adequately define terminology so that the rights and duties of the parties are clearly established at the outset and memorialized while the ICA is in effect."

GT&C DEF. ISSUE 2: IN THE EVENT THAT THE COMMISSION AGREES WITH LEVEL 3 IN THE INTERCARRIER COMPENSATION APPENDIX SECTION 4.5 THAT THE PARTIES SHOULD NOT BE REQUIRED TO USE "CPN" IN THE CALL FLOW FOR IP-ENABLED TRAFFIC BUT RATHER SHOULD USE "CALL RECORD," SHOULD THE COMMISSION INCORPORATE LEVEL 3/'S PROPOSED DEFINITION FOR "CALL RECORD"?

ICA Reference: GT&C Definitions ("Call Record")

This issue concerns Level 3's proposed definition of "Call Record," a term that Level 3 proposes to use in Sections 4.1 through 4.5 of Appendix Intercarrier Compensation instead of the industry-standard term "CPN" (Calling Party Number). The Commission should reject Level 3's proposal to replace the term CPN with the term "Call Records," for the same reasons SBC identifies in its discussion of IC Issue 8. CPN is defined by FCC regulation (47 C.F.R.

§ 64.1600(c)), and is used throughout the industry for the billing of intercarrier traffic, while "Call Records" is a term newly invented by Level 3. Because Level 3's new term "Call Record" should not be used in the parties' agreement, there is no reason to define that term, and Level 3's proposed definition should be rejected.

GT&C DEF. ISSUE 3: **(A) SHOULD THE COMMISSION ADOPT A DEFINITION OF "CIRCUIT SWITCHED INTRALATA TOLL TRAFFIC"?**

(B) IF THE ANSWER TO (A) IS YES, SHOULD CIRCUIT SWITCHED INTRALATA TOLL TRAFFIC BE IDENTIFIED CONSISTENT WITH FCC ORDERS AS THAT TRAFFIC BETWEEN THE PARTIES' LOCAL CALLING AREAS WITHIN ONE LATA IN THE STATE?

ICA Reference: GT&C Definitions ("Circuit Switched IntraLATA Toll Traffic")

The Commission should reject Level 3's proposed definition of "Circuit Switched IntraLATA Toll Traffic," because that term should not appear in the parties' agreement. As SBC explains under IC Issues 2 and 3, Level 3's proposal to create a distinction between "IP-Enabled" and "Circuit Switched" traffic is inappropriate and inconsistent with federal law, and thus the Commission should reject Level 3's proposed terminology.

GT&C DEF. ISSUE 4:

(A) SHOULD THE COMMISSION ADOPT DEFINITIONS OF "DECLASSIFIED" AND "DECLASSIFICATION"?

(B) IF THE ANSWER TO (A) IS YES, SHOULD THE DEFINITION OF 'DECLASSIFIED" AND "DECLASSIFICATION" TAKE INTO ACCOUNT FCC RULES AND JUDICIAL ORDERS REGARDING WHICH NETWORK ELEMENTS MUST BE PROVIDED AS UNES?

ICA Reference: GTC Definitions

This issue concerns the terms "Declassified" and "Declassification," which are used in Section 2 and subtending sections of SBC's proposed Appendix UNE. In those sections, SBC

defines a "declassified" UNE as a network element that once was required to be unbundled by the FCC but that, as a result of subsequent FCC or court decisions, is no longer required to be unbundled. *See* SBC's Appendix UNE, §§ 2.1.1 and 2.1.2. If a UNE is declassified, SBC proposes a transition procedure by which, after 30 days' advance written notice to Level 3, SBC could cease providing the declassified element, though Level 3 has the option of disconnecting or discontinuing its lease of the former UNE before then or purchasing it under a different, non-UNE arrangement. *Id.*, § 2.5.

SBC includes these provisions on declassification because the history of the FCC's unbundling rules has been one of repeated court reversals – in 1999, in 2002, and again in 2004. As a result, SBC has consistently entered into interconnection agreements requiring it to provide UNEs that were required to be unbundled at the time, but that the courts later held should never have been unbundled. Attempting to amend its interconnection agreements to reflect these new rules has proven cumbersome, time-consuming, and sometimes unsuccessful for SBC, even when the courts have plainly vacated the relevant FCC rules. To simplify the process in the event of future declassifications (which could occur as soon as the FCC's issuance of new unbundling rules in its pending proceeding), SBC proposes a specific, streamlined procedure that gives Level 3 ample notice before any UNE is disconnected and allows Level 3 to make alternative service arrangements.

As for the specific definition of "declassified," there can be no doubt that SBC must take into account both FCC rules and orders and court decisions on review of those rules and orders. Declassification can occur by either court or FCC action, as SBC's proposed language properly recognizes. SBC Appendix UNE, § 2.1.2.

Level 3's objection to these definitions seems to be that they would allow SBC to "unilaterally" determine when a UNE has been declassified. But Section 2.1.2 of SBC's Appendix UNE makes clear that declassification occurs by an act of courts or regulators, not by SBC. If Level 3 in good faith disagrees that a UNE has been declassified, it can pursue its remedies under the dispute resolution provisions of the ICA. In most or all cases, however, the fact and scope of declassification is evident from the FCC or court order, so the risk of disputes should be small. In that light, Level 3's real objection must be that the declassification process is too fast. But there is no reason for SBC to have to endure drawn-out proceedings and renegotiation simply to implement a legal ruling that relieves it from unbundling. Accordingly, SBC's proposed language should be adopted.

GT&C DEF. ISSUE 5: SHOULD THE DEMARCATION POINT SERVE AS THE LEGAL, TECHNICAL AND FINANCIAL BOUNDARY BETWEEN THE PARTIES' NETWORKS?

ICA Reference: GT&C Definitions ("Demarcation Point")

Definitions are supposed to be just that – definitions of terms used in the agreement. The definitions section of the agreement is not the proper place for setting forth legal principles associated with a defined term. SBC's definition of "demarcation point" – *i.e.*, the language on which the parties have agreed – says everything that needs to be said about what a demarcation point *is*; the demarcation point is a certain, specified physical point. On the other hand, Level 3 is improperly attempting to expand the definition of "Demarcation Point" to delineate the parties' respective substantive legal, technical and financial rights and obligations. Such language is more appropriately included in specific substantive appendices, and is in fact already included in various appendices. *See*, *e.g.*, Appendix 911, § 4.2.11 ("LEVEL 3 is responsible for the isolation, coordination and restoration of all 911 network maintenance problems to the Demarcation Point between the Parties' networks. SBC-13STATE will be responsible for the

coordination and restoration of all 911 network maintenance problems on its side of the Parties' network Demarcation Point(s).") Moreover, the rights and obligations of the respective parties will depend on the context in which the term "Demarcation Point" is being used. For that reason, Level 3's language is overly simplistic. SBC's proposed language comports with the accepted, industry-wide notion of "Demarcation Point" and should be adopted.

GT&C DEF. ISSUE 6:

The parties have settled this issue.

GT&C DEF. ISSUE 7: SHOULD THE DEFINITION OF INTERNET SERVICE PROVIDER INCLUDE REFERENCE TO PARAGRAPH 341 OF THE FCC'S FIRST REPORT AND ORDER IN DOCKET NO. 97-158?

ICA Reference: GT&C Definitions ("Internet Service Provider")

The Commission should adopt SBC's proposed definition of "Internet Service Provider," or "ISP," and reject Level 3's. Level 3 essentially offers no concrete proposal at all, but proposes that "ISP" be "defined consistent with the FCC in its Orders and regulations." That proposal is unreasonable because Level 3 does not even hint at what definition is "consistent" with the FCC's orders.

The purpose of an interconnection agreement is to define the parties' rights and obligations in a concrete manner. For instance, with respect to UNEs, the contract does not merely state that UNEs will be provided "consistent with the FCC in its Orders and regulations," but defines the particular UNEs that will be provided, and the rates, terms, and conditions that will apply . Similarly, the term "ISP" is used in many contract sections and should be defined in a concrete manner so that the parties can determine their rights and obligations under the contract. The term "ISP" should be defined in a manner consistent with the FCC's orders, but must be *specifically* defined – which is what Level 3 fails to do.

SBC proposes to define an ISP as "an Enhanced Service Provider that provides Internet Services and is defined in paragraph 341 of the FCC's First Report and Order in CC Docket No. 97-158." SBC's proposed definition of ISP, unlike Level 3's, is both concrete and consistent with the FCC's definition of an ISP. Thus, the Commission should adopt SBC's proposed definition.

GT&C DEF. ISSUE 8: SHOULD THE DEFINITION OF "ISP-BOUND TRAFFIC" REFERENCE THE FCC'S ISP COMPENSATION ORDER AND BE LIMITED TO CERTAIN PHYSICAL LOCATIONS OF THE END USER AND TERMINATING ISP?

ICA Reference: GT&C Definitions ("ISP-Bound Traffic")

This issue concerns whether, for purposes of application of the FCC's *ISP Remand Order* compensation plan, "ISP-Bound Traffic" should be limited to traffic from an originating end user to an ISP located in the same local exchange area. SBC's position on this issue is fully discussed in IC Issue 5, which discussion is fully incorporated by reference herein. As explained there, the Commission should adopt SBC's proposed definition because that definition, unlike Level 3's, complies with the *ISP Remand Order*.

GT&C DEF. ISSUE 9(A): SHOULD THE COMMISSION ADOPT A DEFINITION OF "LOCAL/ACCESS TANDEM SWITCH"?

ICA Reference: GT&C Definitions ("Local/Access Tandem Switch")

GT&C Definition Issue 9(a) is whether the term "local/access tandem switch" should be included in the ICA. Level 3 opposes including a definition of this term in the ICA, even though the term is used throughout various appendices, including the GT&C Definitions and ITR Appendices, in both agreed and contested provisions. SBC Ex. 1.0 (Albright Direct) at 80. Because this term appears throughout the ICA, SBC's definition of it should be included in the ICA.

GT&C DEF. ISSUE 9(B): SHOULD THE DEFINITION OF "LOCAL/ACCESS TANDEM SWITCH" REFLECT THAT SUCH SWITCHES ARE USED FOR SECTION 251(b)(5)/INTRALATA TRAFFIC AND IXC-CARRIED TRAFFIC?

ICA Reference: GT&C Definitions ("Local/Access Tandem Switch")

As explained in connection with GT&C Definition Issue 1, SBC's network architecture includes tandems that have been provisioned to handle specific types of traffic. One of these types of tandems is a Local/Access Tandem. This tandem is provisioned to handle Section 251(b)(5)/IntraLATA traffic and IXC-carried traffic. SBC Ex. 1.0 (Albright Direct) at 81-82. It should be defined accordingly.

GT&C DEF. ISSUE 10(A): SHOULD THE COMMISSION ADOPT A DEFINITION OF "LOCAL INTERCONNECTION TRUNK GROUPS"?

ICA Reference: GT&C Definitions ("Local Interconnection Trunk Groups")

GT&C Definition Issue 10(a) is whether the term "local interconnection trunk groups" should be included in the ICA. Level 3 contends it should not, even though the term is used throughout various appendices, including the OET, NIM and ITR Appendices, in both agreed and contested provisions (including provision that Level 3 is advocating). SBC Ex. 1.0 (Albright Direct) at 82-83. Because this term appears throughout the ICA, it should be defined as SBC has proposed.

GT&C DEF. ISSUE 10(B): IF THE ANSWER TO GT&C DEFINITION 10(A) IS YES, SHOULD "LOCAL INTERCONNECTION TRUNK GROUPS" BE DEFINED AS TRUNKS USED TO CARRY SECTION 251(b)(5)/INTRA-LATA TRAFFIC ONLY?

ICA Reference: GT&C Definitions ("Local Interconnection Trunk Groups")

The issue here is whether the term "local interconnection trunk groups" should be defined as trunk groups used to carry only section 251(b)(5)/IntraLata traffic, as proposed by SBC. Not

all trunk groups within SBC network are designed or intended to carry the same types of traffic. SBC Ex. 1.0 (Albright Direct) at 83. SBC engineers and bills its Local Interconnection Trunk Groups specifically to handle only Section 251(b)(5)/IntraLATA traffic (*id.* at 84), and such trunk groups should be defined accordingly. This is an extremely important issue that goes hand in hand with ITR Issue 11(a), where SBC explains why (consistent with Level 3's current practices) jurisdictionally distinct traffic should be routed on separate trunk groups. This issue must be resolved consistent with ITR Issue 11(a). SBC's proposed definition of "local interconnection trunk groups" should be adopted for the reasons stated therein.

GT&C DEF. ISSUE 11(A): SHOULD THE COMMISSION ADOPT A DEFINITION OF "LOCAL/INTRALATA TANDEM SWITCH"?

ICA Reference: GT&C Definitions ("Local/IntraLATA Tandem Switch")

GT&C Definition Issue 11(a) is whether the term "local/IntraLATA tandem switch" should be included in the ICA. Level 3 contends it should not. But because this term appears in the ICA, it should be defined as SBC proposes.

GT&C DEF. ISSUE 11(B): IF THE ANSWER TO (A) IS YES, SHOULD THE DEFINITION OF "LOCAL/INTRALATA TANDEM SWITCH" REFLECT THAT SUCH SWITCHES ARE USED FOR SECTION 251(b)(5)/INTRA-LATA TRAFFIC?

ICA Reference: GT&C Definitions ("Local/IntraLATA Tandem Switch")

SBC's network architecture includes tandems that have been provisioned to handle specific types of traffic. One of these types of tandems is a Local/IntraLATA Tandem Switch. This tandem is provisioned to handle Section 251(b)(5) traffic, ISP-bound traffic, and IntraLATA traffic. SBC Ex. 1.0 (Albright Direct) at 84-85. The ICA should define the term accordingly.

GT&C DEF. ISSUE 12(A): SHOULD THE COMMISSION ADOPT A DEFINITION OF "LOCAL ONLY TANDEM SWITCH"?

ICA Reference: GT&C Definitions ("Local Only Tandem Switch")

GT&C Definition Issue 12(a) is whether the term "local only tandem switch" should be included in the ICA. Level 3 contends it should not, even though this term is used throughout various appendices, including the OET and ITR Appendices, in both agreed and contested provisions (SBC Ex. 1.0 (Albright Direct) at 85), and even though Level 3 has agreed to route only local traffic to local-only tandem switches. However, because the term appears throughout the ICA and because of Level 3's agreement relating to local-only tandems, SBC's proposed definition of the term should be adopted.

GT&C DEF. ISSUE 12(B): IF THE ANSWER TO (A) IS YES, SHOULD THE DEFINITION OF "LOCAL ONLY TANDEM SWITCH" REFLECT THAT SUCH SWITCHES ARE USED FOR SECTION 251(b)(5) AND ISP-BOUND TRAFFIC?

ICA Reference: GT&C Definitions ("Local Only Tandem Switch")

SBC's network architecture includes tandems that have been provisioned to handle specific types of traffic. One of these types of tandems is a Local Only Tandem Switch. This tandem is provisioned to handle only Section 251(b)(5) traffic and ISP-bound traffic, it does not handle IntraLATA or InterLATA IXC carried traffic. SBC Ex. 1.0 (Albright Direct) at 86-87. Accordingly, SBC's proposed definition should be adopted.

GT&C DEF. ISSUE 13: SHOULD THE DEFINITION OF "LOCAL ONLY TRUNK GROUPS" REFLECT THAT SUCH TRUNK GROUPS ARE USED FOR SECTION 251(b)(5) TRAFFIC ONLY?

ICA Reference: GT&C Definitions ("Local Only Trunk Groups")

Level 3 proposes to define Local Only Trunk Groups as "two-way trunk groups that carry Section 251(b)(5) Telecommunications Services Traffic only." SBC proposes to define Local Only Trunk Groups as "two-way trunk groups that carry Section 251(b)(5) Traffic only." The term "Telecommunications Services" used in Level 3's proposed definition is very broad and could be interpreted as allowing non-Section 251(b)(5) Traffic to be improperly commingled with Section 251(b)(5) Traffic over Local Only Trunk Groups. Commingling the two different types of traffic over the same trunk group would lead to improper billing of the non-Section 251(b)(5) traffic and is improper for the reasons explained in ITR Issue 11(a) above. SBC Ex. 1.0 (Albright Direct) at 87-88.

GT&C DEF. ISSUE 14(A): SHOULD THE COMMISSION ADOPT A DEFINITION OF "LOCAL TANDEM"?

ICA Reference: GT&C Definitions ("Local Tandem")

GT&C Definition Issues 14(a) involves whether the term "local tandem" should be included in the ICA. Level 3 contends it should not, even though the term is used throughout various appendices, including the NIM, IC, and ITR Appendices, in both agreed and contested provisions. SBC Ex. 1.0 (Albright Direct) at 88-89. Because this term appears throughout the ICA, it should be defined as SBC proposes.

GT&C DEF. ISSUE 14(B): IF THE ANSWER TO (A) IS YES, SHOULD THE DEFINITION OF "LOCAL TANDEM" INCLUDE ANY LOCAL ONLY, LOCAL/INTRALATA, LOCAL/ACCESS, OR ACCESS TANDEM SWITCH, AS DEFINED, SERVING A PARTICULAR LCA?

ICA Reference: GT&C Definitions ("Local Tandem")

SBC's network architecture includes tandems that have been provisioned to handle specific types of traffic. Among these types of tandems are Local Only, Local/IntraLATA, and Local/Access Tandems. SBC Ex. 1.0 (Albright Direct) at 7-10, 78-90. Each of these tandems is provisioned to handle Section 251(b)(5) and ISP-bound traffic. *Id*. The term "Local Tandem" is used to easily combine all three of these tandem types into a term that can be easily used throughout the contract. SBC's proposed definition should therefore be adopted.

GT&C DEF. ISSUE 15: SHOULD "NETWORK INTERCONNECTION METHODS" BE LIMITED TO THE SPECIFIC METHODS SET FORTH IN THE PARTIES' AGREEMENT AND THOSE MUTUALLY AGREED TO BY THE PARTIES, OR SHOULD THE DEFINITION INCLUDE OTHER METHODS RECOGNIZED BY APPLICABLE LAW, AS DEFINED?

ICA Reference: Appendix NIM § 1.1

Level 3 proposes language in NIM section 1.1 that would define "Network Interconnection Methods" to include not only those methods agreed to by the parties and specified in the ICA, but also any method "according to Applicable Law." Level 3's proposed incorporation of unspecified "Applicable Law" is vague, and could result in needless and time-consuming disputes between the parties. The entire purpose of the definition section is to provide clarity and Level 3's proposed language is anything but clear. If Level 3 has in mind some identifiable method of interconnection that exists today, it should have proposed that method, so that either SBC might agree to it or, failing that, the Commission could arbitrate it on its merits.

GT&C DEF. ISSUE 16: SHOULD THE DEFINITION OF " LEC" INCLUDE A REFERENCE TO A SUCCESSOR-IN-INTEREST TO SBC?

ICA Reference: Definition of "Out of Exchange LEC" (OE-LEC)

This issue is closely tied to the Out of Exchange Issues discussed in Section G below and should be resolved in the context of those issues.

The disagreement relating to the definition of "Out of Exchange LEC" or "OE-LEC" boils down to a dispute about whether the definition should include a reference to a "successor-in-interest" to SBC Illinois. The definition should not contain any such reference. Under Level 3's language, if SBC Illinois sold off part of its ILEC service territory (*e.g.*, it sold the Chicago exchange to MCI), the SBC ILEC service area would nevertheless continue to be defined to include the Chicago service area. This is nonsensical. The OET Appendix is intended to apply when Level 3 is providing service in another incumbent LEC's service territory but is exchanging traffic with SBC. If SBC is no longer the ILEC in Chicago, it does not have obligations as an ILEC (which are those set forth in Section 251(c)) for that area. Additionally, Level 3 did not present any testimony addressing its "successor-in-interest" language.

The Commission should reject Level 3's language and adopt SBC Illinois'.

GT&C DEF. ISSUE 17: **(A) SHOULD THE DEFINITION OF "OUT OF EXCHANGE TRAFFIC" INCLUDE ALL TELECOMMUNICATIONS TRAFFIC, AS DEFINED, OR BE LIMITED TO "SECTION 251(b)(5) TRAFFIC," "INTERLATA SECTION 251(b)(5) TRAFFIC" AND "ISP-BOUND TRAFFIC," AS DEFINED?**

(B) SHOULD THE DEFINITION OF "OUT OF EXCHANGE TRAFFIC" INCLUDE IP-ENABLED SERVICES?

(C) SHOULD THE DEFINITION OF "OUT OF EXCHANGE TRAFFIC" INCLUDE TRANSIT TRAFFIC?

ICA Reference: GT&C Definitions ("Out of Exchange Traffic")

Appendix Out of Exchange Traffic ("OET") is an additional provision of the underlying Agreement, which contemplates the exchange of traffic between SBC and Level 3 that originates or terminates in regions that are not within SBC's incumbent LEC territory. *See* SBC Ex. 7.0 (McPhee Direct) at 11-12. The parties disagree regarding the proper definition of the term "Out of Exchange Traffic," and, in particular, disagree regarding the proper traffic classifications that should be used.

While the out of exchange traffic addressed by Appendix OET is different than the traffic addressed by the Appendix Intercarrier Compensation ("IC"), the traffic *types* are the same, and should be defined the same throughout the entire agreement and its related appendices. Thus, traffic should be classified as Section 251(b)(5) Traffic, and the Commission should reject Level 3's vague "Telecommunications Traffic" and "IP-Enabled Traffic" nomenclature, for all the reasons discussed under IC Issues 2 and 3. Moreover, the Commission should reject Level 3's proposal to include "transit traffic" in the definition of Out of Exchange traffic, because transit traffic should not be addressed in the parties' agreement, for the reasons discussed under IC Issue 10.

GT&C DEF. ISSUE 18: **(A) SHOULD THE COMMISSION ADOPT A DEFINITION OF "SECTION 251(b)(5) TRAFFIC"?**

(B) IF THE ANSWER TO (A) IS YES, SHOULD "SECTION 251(b)(5) TRAFFIC" BE LIMITED TO CERTAIN PHYSICAL LOCATIONS OF THE ORIGINATING AND TERMINATING END USERS?

ICA Reference: GT&C Definitions ("Section 251(b)(5) Traffic")

This issue concerns SBC's proposed use of the term "Section 251(b)(5) Traffic" for reciprocal compensation purposes, and SBC's proposal to rate section 251(b)(5) traffic by the physical location of end users (as opposed to NPA-NXXs). This issue is fully discussed in IC Issue 3.

GT&C DEF. ISSUE 19: **SHOULD THE DEFINITION OF "SWITCHED ACCESS SERVICE" DESCRIBE THE MEANS BY WHICH A TWO-POINT COMMUNICATIONS PATH BETWEEN A CUSTOMER'S PREMISES AND AN END USER'S PREMISES IS ESTABLISHED OR SIMPLY REFERENCE A TARIFF?**

ICA Reference: GT&C Definitions ("Switched Access Service")

SBC and Level 3 disagree regarding the definition of switched access service. SBC proposes using the definition as written in SBC's federal tariffs (SBC's Tariff FCC No. 2). Rather than rewriting the definition that has been in these tariffs for many years, it is more appropriate and less confusing to use the existing tariff definition. The existing tariff definition provides a high level explanation of the associated interstate and intrastate switched access charges that apply under SBC's federal tariffs and state access tariffs.

In contrast, Level 3 proposes to define switched access as "an offering of facilities for the purpose of the origination or termination from or to Exchange Service customer in a given area pursuant to a Switched Access tariff." That proposal is vague and incomplete, and should be

rejected. By omitting from the definition "the ability to originate calls from an end user's premises to a customer's premises, and to terminate calls from a customer's premises to an end user's premises" (language proposed by SBC), Level 3's proposal leaves the definition of switched access open to different interpretations and likely would result in disputes between the parties. *See* SBC Ex. 3.0 (Douglas Direct) at 3-4. Moreover, Level 3's own access tariffs in Indiana and California define "switched access service" consistent with the way SBC Illinois proposes to define it here. Tr. (Douglas) 419-420; SBC Cross Ex. 3.1.

GT&C DEF. ISSUE 20:

The parties have settled this issue.

GT&C DEF. ISSUE 21: **(A) SHOULD VIRTUAL FOREIGN EXCHANGE TRAFFIC, VIRTUAL NXX TRAFFIC AND FX-TYPE TRAFFIC BE DEFINED AS TRAFFIC DELIVERED TO TELEPHONE NUMBERS THAT ARE RATED AS LOCAL BUT ROUTED OUTSIDE OF THAT MANDATORY LOCAL CALLING AREA?**

(B) SHOULD "FX TELEPHONE NUMBERS" BE DEFINED AS TELEPHONE NUMBERS WITH DIFFERENT RATING AND ROUTING POINTS RELATIVE TO A GIVEN MANDATORY LOCAL CALLING AREA?

ICA Reference: GT&C Definitions ("Virtual NXX Traffic," "Virtual Foreign Exchange (FX) Traffic," and "FX Telephone Numbers")

This issue concerns the parties' competing definitions of "FX" traffic. SBC's proposed definition of Virtual FX and FX-type Traffic accurately describes the call flow between the parties that constitutes FX service. SBC also proposes to distinguish Virtual FX and FX-type Traffic from "Dedicated FX Service." In a "Dedicated FX" arrangement, an end-user receives service from a central office outside the end user's mandatory local calling area, while in a "Virtual FX" arrangement the end user is served via use of a "virtual" NXX (a number associated with a rate center in which the customer has no physical location). *See* SBC Ex. 1.0

(Albright Direct) at 91-92. Finally, SBC appropriately defines "FX Telephone Numbers" as those numbers "with different rating and routing points relative to a given mandatory local calling area." *See id.* at 92-93.

Level 3's proposed definition, on the other hand, inappropriately fails to distinguish between Dedicated and Virtual FX services. Level 3 also excludes any reference to the Commission-prescribed mandatory local calling areas. As explained under IC Issue 3, however, such local calling areas are fundamental in order to define the jurisdiction and rating of a call, and to determine the appropriate intercarrier compensation.

C. COORDINATED HOT CUTS ISSUE

CHC ISSUE 1: WHETHER THE PRICES FOR COORDINATED HOT CUTS SHOULD BE BASED ON FORWARD LOOKING ECONOMIC COSTS APPROVED BY THE COMMISSION?

ICA Reference: Appendix CHC §§ 3.1, 3.2

The question presented by this issue is whether the prices Level 3 will pay SBC for optional coordination of hot cuts will be TELRIC prices, as Level 3 proposes, or non-TELRIC, tarrifed prices, as SBC proposes. Level 3's contention that SBC should be required to perform hot cut coordination work at TELRIC-based rates is contrary to law, for the simple reason that hot cut coordination is optional – it is not something that the 1996 Act requires SBC to do. It is axiomatic that the only things an incumbent LEC can lawfully be required to do at the cost-based rates prescribed by Section 252(d) of the 1996 Act are those things that the 1996 Act requires the ILEC to do in the first place (or authorizes the State commission to require the ILEC to do). As a legal matter, the mandatory pricing standards of the 1996 Act plainly apply only to those activities that are within the purview of the requirements of the 1996 Act. And as a matter of basic common sense, if an ILEC cannot be required to perform a particular service at all, it cannot be required to perform that service at a particular price. Moreover, SBC prevailed on this

issue in the AT&T arbitration (Docket 03-0239 at 107) and there is no reason for the Commission to change its resolution of this issue here.

Description of coordinated hot cuts. When an end user customer switches service from SBC to a facilities-based CLEC and retains its existing telephone number, the loop that serves the customer must be moved from SBC's switch to the CLEC's switch, and the customer's phone number must be "ported" from SBC to the CLEC. The physical transfer of the end user's loop from SBC's switch to the CLEC's switch is called a hot cut. Ideally, the hot cut and the porting of the end user's number are done at approximately the same time. One way to accomplish this is for the CLEC to request that SBC perform a basic, non-coordinated, hot cut, which is called a "frame due time" or "FTD" hot cut. In that event, the CLEC specifies the start time for the conversion work by specifying a frame due time on the service order it submits to SBC. When a CLEC uses this option, SBC does not contact the CLEC prior to beginning its work. The work on the two carrier's networks is done within the same time frame (thus, "frame due time"), but with no active coordination (*i.e.*, no communication) between the two carriers. *See* SBC Ex. 2.0 (Chapman Direct) at 6-7.

Instead of a frame due time hot cut, the CLEC may choose to order a coordinated hot cut ("CHC"). This is an optional service that SBC makes available to CLECs, in which SBC technicians take extra time to ensure that both companies perform the service cutover at the same time. On a CHC, SBC, in addition to performing all the same tasks it performs on an FDT hot cut, also actively coordinates with the CLEC during the performance of the work, and will not remove the translations from the SBC donor switch until SBC has received the CLEC's verbal instruction to do so. In some cases, this coordination effort takes very little time. In others – for

instance, when the CLEC is not ready at the originally requested time, or if a large volume of orders is involved – the coordination can take a great deal of time. *See id*. at 7.

The SBC coordination work on a coordinated hot cut is optional. A coordinated hot cut is an optional service that requires SBC to expend additional labor. SBC developed the coordinated process to accommodate CLECs, and devotes substantial technician time to perform the work, but nothing in the 1996 Act requires SBC to perform coordinated hot cuts, or authorizes State commissions to require SBC to perform coordinated hot cuts. Level 3 apparently agrees. Not only has Level 3 not disputed that proposition in this proceeding, but Level 3 agreed to the following language for Section 2.1 of the CHC Appendix:

> 2.1 Coordinated Hot Cut (CHC) Service is an ***optional*** manual service offering that permits **LEVEL 3** to request a designated installation or conversion of service occurring at a specific time of day as specified by **LEVEL 3** during, or after, normal business hours. (Emphasis added.)

Given that the coordination is optional, it necessarily follows, as explained above, that SBC may charge Level 3 its tariffed rate for it, and cannot lawfully be required to limit its charges to the cost-based rates that pertain to services that SBC is required to provide under the 1996 Act.

To avoid any possible confusion, note again that the CHC charge that is the subject of this issue pertains solely to the labor SBC expends in the optional coordination of the hot cut activity. SBC Ex. 2.0 (Chapman Direct) at 8. The CHC charge is entirely independent of and separate from the charge for providing the unbundled loop – a charge that *is* TELRIC based, because the providing of the unbundled loop is required by the 1996 Act. That is, the coordination charge is not included in the TELRIC cost of providing an unbundled loop, and no component of the cost of providing an unbundled loop is included in the non-TELRIC CHC charge. *Id*. at 8-9. Thus, Level 3's suggestion, that the coordination work that is the subject of this issue should be priced at the "Commission-approved, TELRIC rates," is nonsensical. Apart

from the fact that SBC cannot properly be required to perform the coordination work at TELRIC rates, there is no "Commission-approved TELRIC rate" for the SBC coordination work at issue here.

SBC prevailed on this issue in the AT&T arbitration (Docket 03-0239 at 107) and nothing has changed to lead to a different resolution here.

D. INTERCARRIER COMPENSATION ISSUES

IC ISSUE 1: WHICH PARTY'S PROPOSED CLASSIFICATIONS OF TRAFFIC SHOULD BE USED IN THE AGREEMENT?

ICA Reference: Appendix IC § 3.1 (and subsections)

Level 3's proposed Section 3.1 of Appendix Intercarrier Compensation ("IC") makes no sense. In that Section, Level 3 proposes to define all telecommunications traffic exchanged between the parties as one of five kinds of services defined by the 1996 Act (Telephone Toll Service, Telephone Exchange Service, Exchange Access Service, Telecommunications Services, or Information Services). But those categories are not mutually exclusive. Traditional local voice telephone service, for instance, is both a "Telecommunications Service" and "Telephone Exchange Service." Similarly, traditional interLATA toll service is both "Telephone Toll Service" and a "Telecommunications Service." In short, much (if not most) of the traffic exchanged by the parties simply cannot be shoehorned into one of Level 3's proposed classifications, to the exclusion of the others, as Level 3 proposes, because that traffic fits more than one classification. Level 3's proposal would merely introduce confusion and uncertainty into the agreement.

Level 3's proposed Section 3.1 makes no sense for a second reason: in the remainder of its proposed Appendix IC, Level 3 discards the classifications it proposes in Section 3.1, and instead proposes different classifications to define the parties' reciprocal compensation

obligations. In other words, Level 3's proposed Section 3.1 serves no apparent purpose. After proposing five traffic classifications in Section 3.1, Level 3 then proposes to define reciprocal compensation obligations using completely different classifications, including "IP-enabled services" and "ISP-Bound Traffic" (L3 Section 3.2), "Circuit-Switched Traffic" (L3 Section 3.4), "Local Traffic" (L3 Section 5.2), and "Transit Traffic" (L3 Section 5.2.2).[36] Because the classifications in Level 3's proposed Section 3.1 are not used in any meaningful way within the Appendix IC, it makes no sense to include those classifications in that Appendix, and Level 3's proposed language should be rejected.

SBC's proposed Section 3.1, on the other hand, appropriately classifies traffic for purposes of reciprocal compensation, and should therefore be approved. In particular, SBC proposes that "[f]or purposes of compensation," the traffic exchanged between the parties be classified as Section 251(b)(5) Traffic, FX Traffic, ISP-Bound Traffic, Optional EAS or Optional Calling Area Traffic, IntraLATA and InterLATA Toll Traffic, and Meet Point Billing or FGA Traffic. SBC's language reflects the traffic classifications that the parties should use to define traffic for intercarrier compensation purposes. For instance, Level 3 and SBC both propose intercarrier compensation language specifying the treatment of "Optional EAS Traffic" (Sections 3.6, 15.1), "IntraLATA Toll Traffic" (Sections 3.6, 15.1), "Meet Point Billing Traffic" (Section 12), and "ISP-Bound Traffic" (Sections 3.3, 5.2, 15.1).[37]

The Commission should adopt SBC's proposed traffic classifications and reject Level 3's.

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[36] These classifications are inappropriate in their own right, as explained under IC Issues 2, 3, 5, and 10.

[37] SBC's proposed FX Traffic and Section 251(b)(5) Traffic classifications are addressed below under IC Issues 3 and 11. The discussion under those issues explains that these classifications are appropriate, and should be adopted by the Commission.

IC ISSUE 2: **WHAT IS THE PROPER ROUTING, TREATMENT AND COMPENSATION FOR SWITCHED ACCESS TRAFFIC INCLUDING, WITHOUT LIMITATION, ANY PSTN-IP-PSTN TRAFFIC AND IP-PSTN TRAFFIC?**

ICA Reference: Appendix IC §§ L3 3.2-3.4.5, SBC 16-16.1

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." *Access Avoidance Order*, ¶ 3.[38] Numerous carriers 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.

SBC proposes a sensible way to address these new services: essentially, VoIP should be treated like all other traffic, consistent with the FCC's existing rules, unless and until the FCC changes those rules. 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. Appendix IC, SBC § 16.1. The FCC is currently considering whether to make changes to its existing rules with regard to the treatment of IP-based services, including VoIP traffic. 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

[38] 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, 19 F.C.C. Rcd. 7,457 (FCC rel. Apr. 21, 2004) ("*Access Avoidance Order*").

sensible approach and is the only approach that complies with the FCC's current regulations. *See* SBC Ex. 6.0 (Kirksey Direct) at 3-4.

While Level 3 asserts that its proposed language, rather than SBC's, preserves the status quo with respect to VoIP traffic, that is simply not the case. Rather, Level 3 proposes to radically alter existing trunking and compensation mechanisms so that it could use IP-based services to engage in access charge arbitrage and avoid paying lawful compensation for this traffic. In particular, Level 3 proposes adoption of a new intercarrier compensation regime subjecting all VoIP traffic to a reciprocal compensation rate of $0.0005 per minute, and exempting all such traffic from access charges, 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. Appendix IC, L3 §§ 3.2.1, 3.2.3.1.; Tr. (Hunt) at 162. Level 3's proposal is inconsistent with the FCC's regulations and should be rejected.[39]

Level 3 repeatedly asserts that the FCC has exclusive authority over compensation for IP Enabled Services. Although SBC does not agree with all of Level 3's reasoning, SBC agrees that the Commission does not have independent state authority to establish terms and conditions for the exchange of IP-enabled traffic. In a press release issued on November 9, 2004, the FCC announced that it has determined that certain IP-enabled services "cannot practically be separated into intrastate and interstate components, precluding dual state and federal regulatory

[39] The following discussion focuses on the conceptual aspects of Level 3's proposal, *i.e.* the proposal to subject "IP-enabled" traffic to reciprocal compensation. As to the proposed $.0005 rate, that is so preposterous that we devote little attention to it in this brief. That rate is one upon which the parties agreed voluntarily as part of a comprehensive agreement concerning interconnection and reciprocal compensation for their current agreement. (Parties are, of course, free to agree to what they like, without regard to the requirements or pricing standards of the 1996 Act. *See* 47 U.S.C. § 252(a)(1).) Level 3's proposal that the Commission impose this rate, which has no basis in the pricing standards of the 1996 Act, is of course unlawful.

regimes," and instead such services are exclusively jurisdictionally interstate. *Vonage Preemption Petition Press Release* at 1.[40] Thus, this Commission does not have independent state authority to regulate the terms and conditions for the exchange of such traffic.

The implication of that point – that the FCC has exclusive authority to establish intercarrier compensation for VoIP traffic – is this: in this arbitration, the Commission cannot independently create new intercarrier compensation requirements for VoIP traffic, but, under the authority of Sections 251 and 252 of the Act, can only ensure that the parties' interconnection agreement is consistent with the current requirements of federal law. And the latter is all that SBC is asking the Commission to do here. As SBC explains below, with respect to VoIP traffic, federal law currently requires that such traffic is subject to access charges when it is interexchange in nature, as SBC's proposed language provides, and here the Commission must implement that federal law. Level 3, on the other hand, is asking the Commission to create new intercarrier compensation requirements for VoIP traffic, by, among other things, nullifying the FCC's current rules, extending the FCC's ESP exemption to cover carriers that are not ESPs, extending that exemption to cover all "information services," exempting interexchange IP-PSTN traffic from access charges, and instead treat such traffic as local exchange traffic subject to reciprocal compensation under Section 251(b)(5) of the 1996 Act. Level 3's proposed language must be rejected because, as Level 3 itself insists, only the FCC, and not this Commission, has the authority to create such new requirements.

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[40] FCC Press Release, *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (rel. Nov. 9, 2004) ("*Vonage Preemption Petition Press Release*").

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 any ordinary long distance call. SBC Ex. 6.0 (Kirksey Direct) at 5. 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. The FCC has already conclusively ruled that interexchange PSTN-IP-PSTN traffic is subject to the same switched access charges as traditional interexchange calls. In the *Access Avoidance Order*, 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. Level 3 conceded at hearing that IP in the middle traffic is subject to access charges pursuant to the *Access Avoidance Order*, and offered a contract language revision to reflect that concession. Thus, IP in the middle traffic is no longer in issue. The *Access Avoidance Order*, however, provides necessary background for the remaining dispute concerning IP-PSTN traffic.

In the Access Avoidance 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." 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 held, such a service "is a telecommunications service upon which interstate access charges may be assessed." *Id.*[41]

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." *Id.* Thus, consistent with the FCC's *Access Avoidance Order*, the parties' agreement should explicitly reflect the FCC's determination that access charges apply to interexchange PSTN-IP-PSTN traffic, and prohibit access charge avoidance, as SBC's proposed language provides. There appears to be no serious dispute on this question.

IP-PSTN traffic: "IP-PSTN" traffic that is interexchange in 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. SBC Ex. 6.0 (Kirksey Direct) at 5-6. Because such traffic terminates on the PSTN, it is subject

[41] The FCC clarified that its conclusion applies "regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport." *Access Avoidance Order*, ¶ 19.

to access charges when it is interexchange (*i.e.*, when it originates and terminates in different local exchanges).

The FCC's existing rules require that "[c]arrier's carrier [*i.e.*, access] charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b). IP-PSTN calls "use local exchange switching facilities," and thus access charges apply to that traffic when it is interexchange in nature. Moreover, FCC Rule 701(b)(1) provides that reciprocal compensation does not apply to "traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." Instead, Section 251(g) of the Act preserves the "access regimes applicable to this traffic." *ISP Remand Order*, ¶ 37. Thus, interexchange IP-PSTN traffic is subject to access charges, and not (as Level 3 proposes) to reciprocal compensation.

Moreover, this result makes perfect sense. As the FCC stated in its *IP-Enabled Services NPRM* (¶ 61),[42] "[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 and terminated on the PSTN like any other interexchange traffic, and – unless and until the FCC changes the rules – it should be subject to the same compensation obligations as any other interexchange traffic. If Level 3 provides interexchange IP-PSTN services, Level 3 should

[42] Notice of Proposed Rulemaking, *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 (FCC rel. Mar. 10, 2004) ("*IP-Enabled Services NPRM*").

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.

Level 3's Proposal. Level 3 proposes to subject all "IP-enabled services," including IP-PSTN traffic (but, in light of Level 3's 11th hour concession, not PSTN-IP-PSTN traffic), to reciprocal compensation, and to exempt all such traffic from access charges. That proposal is contrary to federal law. As noted above, both interexchange PSTN-IP-PSTN traffic and interexchange IP-PSTN traffic are subject to access charges under the current FCC regime. Indeed, that is why Level 3 filed a petition asking the FCC to *forbear* from the application of interstate and intrastate access charges to IP-PSTN and PSTN-IP-PSTN traffic.[43] And it is equally clear that interexchange IP-based traffic is not subject to reciprocal compensation under section 251(b)(5) of the 1996 Act.

Level 3 asserts that the Commission should take a "'hands-off' approach to regulating [VoIP] services," and that "there should be one unified regulatory approach to VoIP services and technology, not a 50-state patchwork of regulation." Level 3 Ex. 3.0 (Gates Direct) at 49, 54. But that is all the more reason for the Commission to reject Level 3's proposed contract

[43] *Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-266 (filed by Level 3 on Dec. 23, 2003).

language. SBC's proposed language, not Level 3's, represents a "hands-off" approach, because SBC proposes language that is consistent with the FCC's current regulations, as explained above.

Level 3, on the other hand, proposes that the Commission disregard the FCC's current regulations and instead create its own, new compensation scheme for VoIP traffic, notwithstanding that the FCC is currently considering these very issues in its *IP-Enabled Services NPRM*. Level 3 also proposes that the Commission use this two-party arbitration to establish new "IP-enabled services" identification requirements and mechanisms. Appendix IC, L3 § 3.2.2. Level 3's proposal is anything but "hands-off," and would threaten to create the very "50-state patchwork of regulation" that Level 3 purports to decry. Moreover, Level 3's proposal is inconsistent with its own testimony that "[f]rom a policy perspective, it is not wise to address broader social policy goals that impact an entire industry in an arbitration proceeding involving two carriers." Level 3 Ex. 1.0 (Hunt Direct) at 23.

In its recent ruling on Core's petition for forbearance, the FCC made clear that in its *IP-Enabled Services NPRM* it "recognized the need to re-evaluate the existing intercarrier compensation regimes in light of increasing competition and new technologies, such as Internet and Internet-based services," and was "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." *Core Forbearance Order*, ¶ 2 (emphases added).[44] In short, the FCC is currently considering creation of a new compensation regime for services using IP technology, and has all these issues before it. This Commission should not attempt to

[44] Order, WC Docket No. 03-171, ¶ 2 (FCC rel. Oct. 18, 2004) ("*Core Forbearance Order*").

anticipate whatever regime the FCC may promulgate in the future, but should apply the FCC's existing regulations.

Furthermore, Level 3's "policy" argument is also entirely unsupported by any evidence. Level 3 claims that "[t]here is simply no economic justification for treating IP-Enabled services as if they are traditional services," and that "applying access charge[s] on IP-Enabled traffic" would somehow harm the development of VoIP services and lead companies to "shut down facilities and eliminate jobs." Level 3 Ex. 3.0 (Gates Direct) at 53-55. *First*, Level 3's argument is misleading, because SBC is not suggesting that VoIP services should be subject to all the same regulatory requirements applicable to traditional services (*e.g.*, tariffing, pricing, and quality of service requirements); rather, SBC merely asserts that interexchange VoIP traffic should be subject to the same intercarrier compensation rules as all other interexchange traffic.

Second, Level 3's policy argument is irrelevant. The issue here (as Level 3 agrees) is what federal law currently requires. Federal law currently requires access charges for interexchange traffic and does not subject such traffic to reciprocal compensation under section 251(b)(5), and that law makes no distinction and contains no limitations based on the technology used to deliver traffic to or from the PSTN. For example, FCC Rule 69.5 requires access charges for interexchange carriers that "use local exchange switching facilities" (47 C.F.R. § 69.5(b)), no matter what technology is used to carry the call before it is delivered to the PSTN for termination, or after it originates on the PSTN. Traditional TDM-based phone calls, wireless calls, and IP calls all make use of the PSTN and "local exchange switching facilities" on the "PSTN-side" of the call (either originating or terminating) in the same manner, and are subject to the same access charges.

Third, Level 3 provides no proof to support its assertion that a level playing field, whereby all interexchange traffic (including interexchange VoIP traffic) is subject to the same intrastate and interstate access charge regime, would somehow "impede the natural efficiency of the market by unnecessarily burdening the development of new services and hindering their deployment." Level 3 Ex. 3.0 (Gates Direct) at 53. If, as Level 3 asserts, IP technology "offer[s] significant efficiencies from both an economic and network operations perspective" (Level 3 Ex. 3.0 (Gates Direct) at 49), then there should be no need to provide a special exemption to carriers that use such technology to provide interexchange service from the same access charge rules that apply to all other interexchange carriers. Moreover, history – in particular the history of cellular service, which Level 3 otherwise lauds as a "helpful roadmap" to the successful introduction of telecommunications technologies (Level 3 Ex. 1.0 (Hunt Direct) at 12-17) – proves that Level 3's sky-is-falling rhetoric is empty.

When a customer makes a call from a cellular phone to a landline, that call does not originate on the PSTN, but instead uses an alternative technology, and is then terminated on the PSTN. Because the call is terminated on the PSTN, it is subject to terminating access charges (when the call is interexchange).[45] And the application of terminating access charges obviously has not prevented the widespread development and deployment of cellular phones. Similarly, IP-PSTN traffic uses an alternative technology to bypass the PSTN on the originating end, but is then terminated on the PSTN. Level 3 has provided no basis for its speculation that the development of voice services using IP technology will somehow be thwarted merely because

[45] *See Local Competition Order*, n.2485 ("where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge").

such traffic is subjected to the *same* compensation rules that apply to other interexchange traffic, including circuit-switched traffic and cellular-PSTN traffic.[46] As the FCC stated, "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." *Access Avoidance Order*, ¶ 18. The Commission should reject Level 3's attempt to gain an unfair advantage by evading existing intercarrier compensation rules. *See* SBC Ex. 6.0 (Kirksey Direct) at 12-13, 15-16.

Level 3 also attempts to distinguish interexchange VoIP traffic from traditional interexchange traffic on the ground that the former is an "information service." Level 3 Ex. 3.0 (Gates Direct) at 51. But if Level 3 is correct, then the Commission must reject Level 3's proposal to subject VoIP traffic to reciprocal compensation. The FCC Rule that governs reciprocal compensation expressly excludes "traffic that is interstate or intrastate exchange access, information access, or exchange services for such access" from reciprocal compensation. 47 C.F.R. § 701(b)(1). If indeed VoIP services are information services, then Level 3's proposal to require reciprocal compensation for such services again runs directly afoul of the FCC's rules.[47]

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[46] Level 3, citing Section 7(a) of the 1996 Act, also suggests that "[a]s a matter of law and policy, the burden of proof in opposing the introduction of VoIP rests with SBC." Level 3 Ex. 1.0 (Hunt Direct) at 32. That is pure balderdash. SBC does not oppose the introduction of VoIP (indeed, Level 3 itself notes that SBC offers VoIP services (Level 3 Ex. 3.0 (Gates Direct) at 51-52), but opposes only giving VoIP services that use the PSTN an artificial free ride that is not available for other technologies that use the PSTN in the same manner.

[47] The Commission need not address whether IP-PSTN services (or PSTN-IP-PSTN or other VoIP services) are information 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. The point here is that if such services are information services, then they are not subject to reciprocal compensation under Section 251(b)(5), as Level 3 proposes. And even if such services are *not* information services, then they are merely interexchange telecommunications services that again are not subject to reciprocal compensation under section 251(b)(5), but instead are subject to the same access charges that apply to all interexchange telecommunications services.

Level 3 also asserts that IP-PSTN services (and all other VoIP services) are exempt from access charges under the FCC's "ESP exemption." Level 3 Ex. 1.0 (Hunt Direct) at 25, 27, 33, 68-72. Level 3's argument fails for two reasons. First, even if it were correct that VoIP services are exempt from access charges, that would not make them subject to reciprocal compensation, which is what Level 3 is proposing. Once it is determined – as the FCC has conclusively determined, at least for now, in Rule 701(b)(1) – that traffic is not subject to reciprocal compensation for purposes of the 1996 Act, a separate determination that the ESP exemption frees the traffic from access charges would not somehow bring the traffic back within the purview of reciprocal compensation. Rather, under the narrow ESP exemption, "enhanced service providers are treated as end users for purposes of [the FCC's] access charge rules," and thus pay end user charges under FCC Rule 69.5(a). *Northwestern Bell Order*, ¶ 21.[48]

Second, it is not correct in any event that all VoIP services are exempt from access charges. Under the narrow ESP exemption, in certain circumstances "enhanced service providers are treated as end users for purposes of [the FCC's] access charge rules," and thus pay end user charges under FCC Rule 69.5(a) rather than carrier's carrier charges (*i.e.*, access charges) under FCC Rule 69.5(b). *Northwestern Bell Order*, ¶ 21. But "[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers." *Id.* Level 3 is not an ESP, but is an interexchange carrier that serves ESPs, who in turn provide service to end user customers. Level 3 admits this. Tr. (Hunt) at 181-182. Thus, under the ESP exemption, Level 3's ESP customers may not have to pay access charges, but Level 3 still does.

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[48] Memorandum Opinion and Order, In re Northwestern Bell Tel. Co. Petition for Declaratory Ruling, 2 FCC Rcd. 5986 (FCC rel. Oct. 5, 1987) ("Northwestern Bell Order").

Moreover, even if Level 3 were an ESP, the ESP exemption still would not apply to IP-PSTN traffic. That exemption applies only to an ESP's use of the PSTN *as a link between the ESP 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." *MTS/WATS Market Structure Order*, ¶ 78.[49] 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 (emphasis added).[50] 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 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 "PSTN-bound" in the exact same fashion as a traditional long distance telephone call. Similarly, a VoIP service provider (or an underlying carrier providing VoIP transmission services) does not merely "use incumbent LEC networks to receive calls from their customers" (*Access Charge Order*, ¶ 343), but uses the PSTN to *terminate* calls from their customers to *non*-customers in other exchanges (IP-PSTN

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[49] Memorandum Opinion and Order, *MTS and WATS Market Structure*, CC Docket No. 78-72, 97 FCC 2d 682 (1983) ("*MTS/WATS Market Structure Order*").

[50] First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997) ("*Access Charge Order*").

traffic), or to receive calls from *non*-customers in other exchanges (PSTN-IP traffic), just like traditional long distance telephone calls. In short, the FCC's limited ESP exemption simply does not apply to these VoIP services.

Indeed, Level 3 as much as admits that the ESP exemption does not squarely apply here, and that Level 3 is asking this Commission to *extend* that FCC-created exemption. Level 3's witness notes that the ESP exemption "only governed charges that an ILEC could levy on an ESP customer, not charges that an ILEC levied on an interconnected LEC," because "there were no CLECs serving ESPs that were sending traffic to ILEC customers." Level 3 Ex. 1.0 (Hunt Direct) at 74-75. Level 3, of course, is not an ESP or end-user customer of SBC, but is an interconnected LEC that "serves a number of ISPs." Level 3 Ex. 2.0 (Wilson Direct) at 34. While Level 3 may believe that the FCC-created exemption should be extended to interconnecting LECs that use IP technology, that is precisely one of the issues currently under consideration by the FCC.

Level 3 also attempts to make much of SBC's purported agreement with Level 3 "that IP-enabled services are interstate services," not intrastate services, citing SBC's comments to the FCC in its *IP-Enabled Services NPRM* proceeding. Level 3 Ex. 1.0 (Hunt Direct) at 66. Level 3 makes too much of SBC's comments. In that *NPRM* (¶ 38) the FCC requested "comment[s] on the jurisdictional nature of IP-enabled services." In response, SBC explained that interexchange IP-PSTN traffic is jurisdictionally interstate, and should be subject exclusively to interstate access charges, and urged the FCC to make such a determination. Until the FCC rules on the matter, however, the Commission, in order to preserve the *status quo*, should require that compensation for such traffic be at the applicable "jurisdictionalized" access rate (interstate or

intrastate) in accordance with SBC's existing switched access tariffs.[51] *See Access Avoidance Order*, nn.61 & 64 (refusing to "find that IP telephony is within the [FCC's] exclusive jurisdiction" and leaving the issue to the *IP-Enabled Services* proceeding).

Finally, the Commission does not have the discretion in this proceeding to rewrite section 251(b)(5) of the 1996 Act or 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 the 1996 Act 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 Level 3's proposed language emphatically does not.

For all these reasons, the Commission should approve SBC's proposed language addressing the treatment of VoIP traffic, and reject Level 3's. Level 3's proposal to treat all IP-enabled traffic as local traffic subject to reciprocal compensation, and not access charges, is contrary to the FCC's current compensation scheme.

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[51] To effectuate such compensation where there is a lack of geographically accurate endpoint information (which may be the case on the IP side of a call), the parties should apply the existing tariffed methods to determine whether an interexchange call is intrastate or interstate (*e.g.*, by using the calling party number). *See* SBC Ex. 6.0 (Kirksey Direct) at 10.

IC ISSUE 3: **SHOULD THE AGREEMENT DEFINE SECTION 251(b)(5) TRAFFIC TO MEAN CALLS IN WHICH THE ORIGINATING END USER AND THE TERMINATING END USER ARE BOTH PHYSICALLY LOCATED IN THE SBC LOCAL EXCHANGE AREA OR COMMON MANDATORY LOCAL CALLING AREA?**

ICA Reference: Appendix IC § 3.2

Use of the term "Section 251(b)(5) Traffic." IC Issue 3 concerns SBC's proposal to use the defined term "Section 251(b)(5) Traffic" to describe the traffic that is subject to reciprocal compensation under Section 251(b)(5) of the 1996 Act. Level 3 opposes use of this terminology, and instead proposes to use the term "circuit switched Local Traffic (intra exchange and mandatory EAS)" to describe traffic subject to reciprocal compensation under Section 251(b)(5). Appendix IC, L3 § 5.2. Level 3's proposal, however, is outdated, and is inconsistent with FCC rules.

In its *Local Competition Order*, the FCC originally "attempted to describe the universe of traffic that falls within subsection (b)(5) as all 'local' traffic," just as Level 3 proposes here. *ISP Remand Order*, ¶ 34.[52] *See id.* ¶ 24 ("In the [*Local Competition Order*], the Commission determined that the reciprocal compensation provisions of section 251(b)(5) applied only to what it termed 'local' traffic . . . ."). In its subsequent *ISP Remand Order*, 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)." *Id.* Thus, the FCC held, "we now find inappropriate" use of the "local" terminology. *Id.* n.61. The FCC concluded that it was

[52] Order on Remand and Report and Order, *In re Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151 (2001) ("*ISP Remand Order*").

"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. This Commission should reject Level 3's attempt to resurrect the same terminology already decisively rejected by the FCC.

Instead of inappropriately classifying traffic as "Local," SBC proposes to use the term "Section 251(b)(5) Traffic" to describe the traffic subject to Section 251(b)(5). This proposal is in conformity with the FCC's *ISP Remand Order*, and should be adopted.

In discarding the terminology "local," the FCC 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) (including traditional local voice service), *which the FCC referred to as "section 251(b)(5) traffic"* (*ISP Remand Order*, ¶ 8), and traffic that is carved-out of Section 251(b)(5) by Section 251(g), which includes ISP-bound traffic. Thus, SBC's proposed language appropriately defines "Section 251(b)(5) Traffic" as the traffic that is subject to the reciprocal compensation obligation of Section 251(b)(5), and separately identifies "ISP-Bound Traffic" to denote the ISP-bound traffic that the FCC held is *not* subject to Section 251(b)(5), but is instead subject to the FCC's *ISP Remand Order* compensation plan (which consists of a series of declining rate caps that ILECs may elect).

The FCC's Wireline Competition Bureau reached the same result in the *Virginia Arbitration Order*. In that interconnection agreement arbitration, the Bureau (acting in the place of the Virginia commission) rejected MCI's proposal to use the term "local," and "order[ed] that the term 'section 251(b)(5) traffic' be substituted for the term 'Local Traffic.'" *Virginia*

Arbitration Order, ¶ 313. As the Bureau stated, in the *ISP Remand Order* "the Commission did find that use of the phrase 'local traffic' created unnecessary ambiguities" and "[i]nstead, the Commission has used the term 'section 251(b)(5) traffic' to refer to traffic subject to reciprocal compensation." *Id.* ¶ 315.

In its position statement in the DPL, Level 3 suggests that SBC's proposed terminology is too restrictive, because "Section 251(b)(5) applies to the exchange of 'telecommunications' which applies to all forms of traffic." But that is a red herring, because Level 3's counter-proposal is even more restrictive. Level 3 itself proposes to limit reciprocal compensation to "Local Traffic" (which Level 3 does not define), and SBC's proposed language has the same effect, by defining Section 251(b)(5) Traffic as "telecommunications traffic" where the originating and terminating end users are in the same local calling area. Moreover, while SBC's proposal limits reciprocal compensation to local "telecommunications traffic," Level 3 proposes much more restrictive language that would limit reciprocal compensation to local "circuit switched" traffic, which Level 3 defines as telecommunications services traffic that satisfies a detailed 6-part test. Appendix IC, L3 § 3.4 (and subsections). And Level 3 offers nothing to demonstrate that any local traffic that does *not* satisfy its proposed 6-part test is not a local "telecommunication" to which reciprocal compensation applies.

In short, Level 3's proposal to classify traffic subject to reciprocal compensation as "circuit switched Local Traffic" is inconsistent with federal law. In the *ISP Remand Order*, the FCC expressly rejected the "local" terminology, and instead used the term 'section 251(b)(5) traffic' to refer to traffic subject to reciprocal compensation." *Virginia Arbitration Order*, ¶ 315. *See ISP Remand Order*, ¶¶ 8, 25, 89, 98 (using term "section 251(b)(5) traffic"). Accordingly, the Commission should adopt SBC's proposed language, and reject Level 3's.

Definition of Section 251(b)(5) Traffic. Level 3 also opposes SBC's proposed definition of Section 251(b)(5) Traffic insofar as that definition is limited to calls where the originating and terminating end users are physically located in the same local exchange area (or exchange areas "within the same common mandatory local calling area"). Appendix IC, SBC § 3.2. Level 3 asserts that instead "the rating of a call for purposes of defining the appropriate intercarrier compensation for circuit switched traffic" should be "determined based on the NPA-NXX of the calling and called parties," regardless of their geographic locations. Level 3 Ex. 3.0 (Gates Direct) at 44. Level 3 is wrong, as this Commission has held no less than six times.

A call that originates in one local exchange area in a LATA and terminates in another local exchange area in the same LATA is an intraLATA toll call, which is not subject to reciprocal compensation. *See* 47 C.F.R. § 51.701(b)(1). Typically, the NPA-NXX of any given telephone number (for example, 317-242 in the phone number (317) 242-1234) is uniquely associated with the local exchange area in which calls from that number originate. Consequently, the network can typically identify a "local" call, *i.e.*, a call that originates and terminates in a single local exchange area, by matching the NPA-NXX of the calling party with the NPA-NXX of the called party. Likewise, the network can typically identify an intraLATA toll call based on the NPA-NXX's of the calling party and the called party.

Foreign exchange ("FX") service allows a customer physically located in one local calling area (or "exchange"), like Evanston, to have a telephone number that is associated with a different exchange, like Chicago. Thus, callers in Chicago can reach the FX customer in Evanston by dialing a telephone number that *looks* like a Chicago number (thereby avoiding long distance charges), even though the call is transported and terminated at the FX customer's location in the distant Evanston exchange. In reality, such traffic only masquerades as local,

when in fact the traffic is routed and travels from one local exchange area to another. That is, FX traffic is in fact interexchange traffic. *See* SBC Ex. 7.0 (McPhee Direct) at 16-18.

Level 3's position is that if a call to an FX customer "looks" local to the network, it should be treated as local by being made subject to reciprocal compensation, even though the call actually passes from one local exchange area to another and thus – based on the path it travels – would otherwise be treated as an intraLATA toll call. Level 3 is wrong, as this Commission has repeatedly held. A call is an intraLATA toll call because it travels from one local exchange area into another local exchange area in the same LATA, not because of the NPA-NXX's of the calling party and the called party. To be sure, the NPA-NXX's have traditionally been used, and can generally still be used, to *identify* which calls are local (and therefore subject to reciprocal compensation) and which are not. But what actually matters is the actual geography of the call – and if the NPA-NXX's make a call that is actually intraLATA "look" local, that does not make it a local call.

This Commission has held – six times, by SBC's count[53] – that 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.[54] AT&T appealed, and this Commission filed in federal court just a few

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[53] *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).

[54] *See* Docket No. 03-1239, Arbitration Decision (Aug. 26, 2003), at 120, 123-34.

weeks ago a brief that (if any more reaffirmation were needed) disposes of Issue 4A. The Commission stated:

> In Illinois, the ICC has adopted a policy that FX traffic, *including FX traffic that is ISP-bound*, is not subject to reciprocal compensation, but instead must be exchanged on a bill-and-keep basis. Beginning in 2000 . . . , the ICC determined that FX traffic is subject to a bill-and-keep regime. In fact, in no fewer than three instances, the ICC has ordered SBC . . . to exchange FX traffic on a bill and keep basis. . . . [G]iven that the FCC's *ISP Remand Order* preserved the ICC's bill-and-keep policy, and given that the ICC has unwaveringly applied that policy to FX traffic in Section 252 arbitrations, the ICC was entitled to require AT&T and SBC to exchange FX traffic on a bill-and-keep basis.[55]

SBC's proposed contract language properly preserves the distinction between traffic "that travel[s] to points . . . beyond the local exchange" and traffic that does not travel beyond the local exchange. Level 3's proposal to rate traffic solely by NPA-NXX, on the other hand, does not properly incorporate this distinction. SBC's proposed language should therefore be adopted.[56]

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[55] The Commissioners of the Illinois Commerce Commission's Combined Response Brief in Opposition to the Opening Briefs of AT&T and SBC Illinois, *AT&T v. Illinois Bell Tel Co.*, U.S. Dist. Ct., N.D. Ill. No. 04 C 1768 (filed Sept. 9, 2004), at 13-14.

[56] Level 3 asserts that the parties' current agreement rates traffic solely by NPA-NXX. That is irrelevant. The parties' current intercarrier compensation agreement was entered into as a voluntary, 13-State settlement agreement, and expires at the end of 2004. *See* SBC Ex. 7.0 (McPhee Direct) at 39-40. That agreement had "gives and takes" for both parties, and Level 3 is not entitled to parse the agreement in an attempt to hoard whatever it "took" while rejecting whatever it "gave" in return.

IC ISSUE 4: **IS IT APPROPRIATE FOR THE PARTIES TO AGREE ON PROCEDURES TO HANDLE SWITCHED ACCESS TRAFFIC THAT IS DELIVERED OVER LOCAL INTERCONNECTION TRUNK GROUPS SO THAT THE TERMINATING PARTY MAY RECEIVE PROPER COMPENSATION?**

ICA Reference: Appendix IC §§ 4.7 (and subsections), 16.2

IC Issue 4 concerns the proper routing for interexchange traffic, including interexchange IP-PSTN and PSTN-IP-PSTN traffic. (SBC's position on this issue is also found under ITR Issue 18(b), which discussion is fully incorporated by reference herein.) Level 3 proposes that the parties exchange all "IP Enabled Services traffic over Local Interconnection Trunk Groups," even when such traffic is clearly non-local, but is interexchange traffic. Appendix IC, L3 § 4.7.2. SBC, on the other hand, proposes that all "Switched Access Traffic" (*i.e.*, interexchange traffic, including PSTN-IP-PSTN and IP-PSTN VoIP traffic) be routed over the trunk groups that have always been used for interexchange traffic. Level 3's proposal should be rejected, and SBC's proposal to maintain the regulatory status quo should be adopted. *See* SBC Ex. 6.0 (Kirksey Direct) at 17.

As explained under IC Issue 2, Level 3's suggestion that all VoIP traffic should be treated as local traffic is contrary to federal law. Under the FCC's current intercarrier compensation regime, interexchange PSTN-IP-PSTN and IP-PSTN traffic is subject to the same access charges as all other interexchange traffic. Thus, interexchange PSTN-IP-PSTN and IP-PSTN traffic should be routed over access trunk groups, as SBC proposes, and not local interconnection trunk groups, as Level 3 proposes. Local interconnection trunk groups are not intended for access traffic, and do not permit SBC to bill access charges. SBC Ex. 6.0 (Kirksey Direct) at 10-12, 17-18. If Level 3 were allowed to use local interconnection trunk groups to route interexchange PSTN-IP-PSTN and IP-PSTN traffic, it 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. *See id.* In the FCC's words, interexchange 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 [Level 3] 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 proposes language specifying the procedures to be used if a third party inappropriately delivers interexchange traffic over local interconnection trunk groups. Appendix IC, SBC § 16.2. In such a case, the terminating party may object in writing to the 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. *See id.* SBC's proposed language is lawful and reasonable, and should be adopted. This language does not allow any party to engage in self-help, but requires cooperative, joint action by SBC and Level 3, followed, if necessary, by Commission intervention. Ensuring the proper delivery of interexchange traffic is essential in order to enable the parties to obtain proper terminating access charges associated with such traffic. SBC Ex. 6.0 (Kirksey Direct) at 10-13. Therefore, the Commission should adopt SBC's proposed language.

IC ISSUE 5: **SHOULD THE AGREEMENT DEFINE ISP-BOUND TRAFFIC TO MEAN CALLS IN WHICH THE ORIGINATING END USER AND THE TERMINATING ISP ARE BOTH PHYSICALLY LOCATED IN THE SBC LOCAL EXCHANGE AREA OR COMMON MANDATORY LOCAL CALLING AREA?**

ICA Reference: Appendix IC § 3.3

Both Level 3 and SBC propose to define the term "ISP-Bound Traffic" for purposes of intercarrier compensation. The parties disagree, however, regarding the proper definition. SBC proposes to limit "ISP-Bound Traffic" to what is effectively "local" ISP-bound traffic – that is, traffic from an originating end user customer to an ISP located in the same local exchange area (or mandatory local calling area) – while Level 3 opposes that limitation. SBC's proposed language properly implements the *ISP Remand Order*, while Level 3's does not, because local ISP-bound traffic is the only type of ISP-bound traffic addressed by the FCC in the *ISP Remand Order*. That is, the term "ISP-bound traffic" in the *ISP Remand Order* refers to calls from end users to ISPs physically located in the same local calling area, and not ISP traffic between end users and ISPs located in different local calling areas.

The question addressed by the FCC in the *ISP Remand Order* 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 (emphasis added). Many CLECs had argued that such calls were "local" calls subject to reciprocal compensation under section 251(b)(5) because the calls terminated at an ISP in the same local exchange in which the calls originates. Some ILECs, on the other hand, argued that such calls were not "local" because the communication "continue[d] beyond the local ISP server." *Id.* ¶ 14. That is the issue the FCC addressed.

But in the event that an end-user calls an ISP that is *not* within the same local calling area, there was never any question that that call was not, and still is not, subject to reciprocal compensation under Section 251(b)(5). A call from, *e.g.*, Indianapolis to Chicago is an interexchange call, whether the called party is a residential POTS customer or an ISP. In short, 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 parties' contract should thus make clear that the FCC's interim intercarrier compensation plan is applicable only to ISP-Bound traffic from end users to ISPs physically located in the same local calling area.[57]

IC ISSUE 6: SHOULD THE PARTY WHOSE END USER ORIGINATES SECTION 251(b)(5) TRAFFIC COMPENSATE THE PARTY WHO TERMINATES SUCH TRAFFIC TO ITS END USER FOR THE TRANSPORT AND TERMINATION OF SUCH TRAFFIC?

ICA Reference: Appendix IC § 3.6

IC Issue 6 concerns SBC's proposal to use the term "Section 251(b)(5) Traffic," and Level 3's competing proposal to use the term "Circuit Switched Traffic." As explained under IC Issue 3 (which discussion is fully incorporated by reference herein), SBC's proposed language should be adopted, and Level 3's rejected.

[57] Level 3 relies on footnote 82 of the *ISP Remand Order*. That footnote, however, is irrelevant here. In that footnote, the FCC explained that the definition of "information access" "does not further require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic." SBC's proposed definition of ISP-bound traffic, however, requires only that the calling party and the called ISP be located in the same local exchange, in accordance with the *ISP Remand Order*; SBC does not propose to further limit "ISP-Bound Traffic" to transmissions that, once handed over to the ISP, do not continue beyond the local ISP's server but instead are then "terminated" by the ISP in the same exchange area in which it is located (which could exclude the vast majority of all Internet traffic).

IC ISSUE 7: **(A) WHEN SHOULD THE PARTIES' OBLIGATION TO PAY INTERCARRIER COMPENSATION TO EACH OTHER COMMENCE?**

(B) WHEN SHOULD THE PARTIES' OBLIGATION TO PAY ACCESS CHARGES COMMENCE?

ICA Reference: Appendix IC § 3.7

IC Issue 7(a). As SBC proposes, the parties should begin paying each other compensation for intercarrier traffic on the date that the parties agree interconnection is complete and ready to handle traffic of all pertinent types, including Section 251(b)(5) and ISP-bound traffic, 911 traffic and traffic routed over High Volume Call-In ("Choke") trunks for purposes of taking large volumes of calls for high-volume bursts of traffic such as radio station contests. *See* SBC Ex. 7.0 (McPhee Direct) at 35-37. With regard to 911 provisioning, the network is considered complete only after Level 3 furnishes confirmation that it has 911 agreements in place with Public Safety Answering Points (or after Level 3 secures a 911 waiver from SBC). *Id* at 36. Absent a waiver, SBC does not turn the interconnection trunks up for service until 911 confirmation is provided. Once confirmation is received, SBC considers that the network is complete and a CLEC is capable of originating and terminating traffic for end users, not simply test traffic.

While Level 3 asserts that intercarrier compensation should not be due for test traffic, SBC's proposed language already takes that concern into account. Even though intercarrier compensation arrangements may not apply on all different traffic types, such as Information Services traffic, the network must be considered "complete" by both parties prior to exchanging and compensating for "live" traffic. *Id.* Before passing this live traffic, carriers often send test calls over various portions of the network to ensure that the network is routing and completing calls in an appropriate manner. *Id.* SBC's contract language does not require test traffic – no

matter the volume of it – to be compensated under intercarrier compensation provisions in the contract, but instead requires compensation only after *both* parties agree that interconnection is complete.

IC Issue 7(b). As with other provisions governing the treatment of access traffic, the parties' respective tariffs govern the terms and conditions for the commencement of intercarrier compensation for this type of traffic. Thus, Level 3's proposal to override those tariffs with contract language addressing the application of access charges to test traffic should be rejected.

IC ISSUE 8: SHOULD THE DUTY TO PROVIDE CPN WITH THE CALL FLOW BE IMPOSED ON ALL TRAFFIC THE PARTIES EXCHANGE, OR JUST THE CIRCUIT SWITCHED TRAFFIC THE PARTIES EXCHANGE?

ICA Reference: Appendix IC §§ 4.1 – 4.5

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. SBC Ex. 7.0 (McPhee Direct) at 37-38. SBC proposes that Section 4.5 require the parties to transmit CPN on all "traffic" the parties exchange. If any type of traffic is allowed to pass without CPN, improper arbitrage opportunities would result, because traffic could be mis-jurisdictionalized; in other words, access traffic could be passed off as section 251(b)(5) traffic. Because standard telephone industry practice requires carriers to pass along CPN with calls, including such a requirement in the parties' agreement is reasonable in order to ensure contractual certainty and conformance with standard practice. *Id.*

Level 3's proposed language for Section 4.5 would require that CPN be provided only for "Circuit Switched Traffic." That proposed language is inappropriate, however, and should be rejected. As explained above under IC Issue 3, Level 3's proposed term "Circuit Switched

Traffic" is both inappropriate and unduly restrictive. For instance, "Circuit Switched Traffic" excludes wireless traffic that is terminated on the PSTN, and thus Level 3's proposed language could inappropriately allow carriers to strip wireless calls of CPN. Without SBC's proposed language, a CLEC might improperly use the parties' local interconnection trunks to exchange traffic that is *not* within the scope of this Agreement, *and* might disguise that fact by not including the CPN. The essential purpose of the SBC language to which Level 3 objects (all "traffic") is that if Level 3 does (improperly) pass such traffic to SBC over the parties' local interconnection trunks, Level 3 has a contractual obligation to include the CPN so that SBC can see what is happening on its network.

Level 3 also argues that CPN is not available in all circumstances, such as for "IP-Enabled Traffic," and thus the obligation to provide CPN should be limited to "Circuit Switched Traffic." But that that excuse does not hold water. Even calls originated in the IP format have an underlying telephone number associated with the end user that originated the IP call, and SBC simply seeks to obtain that underlying telephone number in order to appropriately rate and bill for that call. SBC Ex. 7.0 (McPhee Direct) at 37-38. And, Level 3 itself admits that it can provide CPN with IP-Enabled traffic. (Tr. (Wilson) at 232.

Level 3 also proposes to replace the term "CPN" with the term "Call Records." L3 §§ 4.1–4.5. That proposal, too, should be rejected. CPN is the standard call identification, known and used throughout the industry for the billing of intercarrier traffic. SBC Ex. 7.0 (McPhee Direct) at 37-38. Moreover, the term is expressly defined by FCC regulation. 47 C.F.R. § 64.1600(c). "Call Records," on the other hand, is a term made up by Level 3.

IC ISSUE 9: **(A) SHOULD THE DISPUTE RESOLUTION PROCESS FOR ISP-BOUND TRAFFIC BE THE SAME AS THE DISPUTE RESOLUTION PROCESS FOR SECTION 251(b)(5) TRAFFIC?**

(B) SHOULD THE ICA SPECIFY THAT DISPUTES RELATED TO THE JURISDICTIONAL NATURE OF TRAFFIC BE SUBJECT TO THE DISPUTE RESOLUTION PROCESS CONTAINED IN THIS AGREEMENT?

ICA Reference: Appendix IC §§ 4.7.2.1, 5.6

The parties appear to agree that the same dispute resolution process should apply to both ISP-bound traffic and traffic subject to section 251(b)(5). Thus, the Commission should approve SBC's proposed Section 5.6, which provides: "The parties agree that all terms and conditions regarding disputed minutes of use, nonpayment, partial payment, late payment, interest on outstanding balance, or other billing and payment terms shall apply to ISP-Bound Traffic the same as for Section 251(b)(5) Traffic under this Appendix."

The Commission should reject Level 3's proposed counter-language, because that language is overly broad. Level 3 proposes that "[s]hould any dispute arise over the jurisdictional nature or classification of traffic," the parties will use "the dispute resolution process contained within this Agreement." Appendix IC, L3 § 4.7.2.1. While Level 3's language would have the effect of subjecting ISP-bound traffic and section 251(b)(5) traffic to the same dispute resolution process, it would also, and inappropriately, subject disputes regarding *all other "traffic"* to the agreement's dispute resolution process. That would be inappropriate, because disputes regarding traffic outside the scope of the parties' agreement should not be subject to the agreement's dispute resolution provisions. Rather, any such disputes should by governed by the tariffs applicable to such traffic. *See* SBC Ex. 7.0 (McPhee Direct) at 48-49.

IC ISSUE 10:

(A) SHOULD THE RECIPROCAL COMPENSATION TERMS OF THE AGREEMENT APPLY TO "TELECOMMUNICATIONS TRAFFIC" OR TO "SECTION 251(b)(5) TRAFFIC"?

(B) WHAT INTERCARRIER COMPENSATION ARRANGEMENTS SHOULD APPLY UNTIL SBC OFFERS TO EXCHANGE TRAFFIC PURSUANT TO THE COMPENSATION ARRANGEMENT SET FORTH IN THE FCC'S *ISP REMAND ORDER*?

(C) SHOULD THE COMMISSION ADOPT SBC'S BIFURCATED RATE STRUCTURE FOR THE EXCHANGE OF WHAT SBC DEFINES AS "SECTION 251(b)(5) TRAFFIC"?

(D) SHOULD SBC'S PROPOSED LANGUAGE REGARDING TANDEM SERVING RATE ELEMENTS AND END OFFICE SERVICE RATE ELEMENTS BE INCORPORATED INTO THIS APPENDIX?

(E) IS LEVEL 3 ENTITLED TO CHARGE THE TANDEM RECIPROCAL COMPENSATION RATE?

ICA Reference: Appendix IC §§ 5.1 – 5.5

IC Issue 10 concerns Section 5 of the Appendix IC, which addresses reciprocal compensation under Section 251(b)(5) of the 1996 Act. The parties have a number of discrete disputes regarding Section 5.

IC Issue 10(a). SBC's proposed language provides that reciprocal compensation applies to the termination of "Section 251(b)(5) Traffic," while Level 3 proposes to apply reciprocal compensation to "all circuit switched Local Traffic" and "ISP-Bound Traffic." Appendix IC, L3 § 5.2. As explained under IC Issue 3 (which discussion is fully incorporated herein by reference), the Commission should reject Level 3's proposal, and adopt SBC's. In the *ISP Remand Order* (¶¶ 8, 45, 46), the FCC expressly rejected use of the terminology "local traffic" for reciprocal compensation purposes, in favor of the terminology "section 251(b)(5) traffic."

IC Issue 10(b). Level 3's proposed language is also inconsistent with federal law insofar as Level 3 proposes that ISP-bound traffic is subject to reciprocal compensation (Appendix IC, L3 § 5.2), and insofar as Level 3 refuses to implement the interim compensation scheme for ISP-bound traffic created by the *ISP Remand Order*. The core holding of the FCC's *ISP Remand Order* is that ISP-bound traffic is *not* subject to the reciprocal compensation obligation of Section 251(b)(5) of the 1996 Act: "ISP-bound traffic is not subject to the reciprocal compensation requirement in section 251(b) because of the carve-out provision in section 251(g), which excludes several enumerated categories of traffic from the universe of 'telecommunications' referred to in section 251(b)(5)." *ISP Remand Order*, ¶ 23. *See also id.* ¶¶ 3, 54. Instead, the FCC held, ISP-bound traffic is subject to the FCC's *ISP Remand Order* compensation plan, which consists of a series of declining rate caps that ILECs may elect. *Id.* ¶¶ 7-8. SBC has elected to use those rate caps (SBC Ex. 7.0 (McPhee Direct) at 9, 24-25), and thus, pursuant to federal law, the current compensation rate for ISP-bound traffic is $0.0007 per minute. *ISP Remand Order*, ¶¶ 7-8.

Level 3, however, proposes to ignore the *ISP Remand Order*'s ISP-bound traffic rate caps, and its holding that ISP-bound traffic is not subject to reciprocal compensation. Instead, Level 3 proposes to treat ISP-bound traffic like "local" traffic, subject to a reciprocal compensation rate of $0.0005 per minute. L3 § 5.2.3. Level 3 does not even attempt to offer a legal justification for its scofflaw proposal,[58] but instead merely asserts that the FCC is likely to

[58] The Commission cannot, of course, adopt Level 3's proposed $.0005 rate. That rate is one upon which the parties agreed voluntarily as part of a comprehensive agreement concerning interconnection and reciprocal compensation for their current agreement. (Parties are, of course, free to agree to what they like, without regard to the requirements or pricing standards of the 1006 Act. *See* 47 U.S.C. § 252(a)(1).) Level 3 even admits that the negotiated agreement that included the $.0005 rate had "give and take on both sides" (Tr. (Hunt) at 173), and that what it is now proposing is "to carry forward something that Level 3 wants to carry forward, but we won't carry forward all of SBC's takes" (*id*. at 221). The Commission could not lawfully require the parties to re-adopt their (cont'd)

promulgate a new compensation regime prior to December 31, 2004, and in the meantime the Commission should "hold the status quo." Level 3 Position Statement, IC Issue 10. That is nonsense, because if the FCC promulgates new rules governing compensation of ISP-bound traffic, SBC and Level 3 have *already agreed* to immediately implement those new requirements. Appendix IC, Joint § 5.1 ("At such time as the FCC issues a successor order to the current interim termination compensation plan, the parties agree to compensate each other according to such Order immediately upon the effective date of the FCC order."). In the meantime, however, the Commission is bound to apply the *ISP Remand Order*, and should therefore adopt SBC's proposed language.[59]

Introduction to IC Issues 10(c), 10(d), 10(e). IC Issues 10(c)-(e) concern Sections 5.2 through 5.5 of SBC's proposed contract language, which provide for a bifurcated reciprocal compensation rate structure, list the end office and tandem rate elements that apply, and state that Level 3 is entitled to the end office serving rate elements only. Appendix IC, SBC §§ 5.2-5.5. SBC has exercised its right to invoke the *ISP Remand Order*'s compensation plan for ISP-bound traffic. Thus, that FCC-created plan applies to ISP-bound traffic (as reflected in Section 6 of SBC's proposed Appendix IC language), and Sections 5.2-5.5 are inapplicable to ISP-bound traffic (as provided in Section 5.1 of SBC's proposed language, which makes Sections 5.2-5.6 inapplicable to ISP-bound traffic once SBC has elected the "terms and conditions of the FCC's interim ISP terminating compensation plan").

(… cont'd)

negotiated agreement in its entirety – even with all the gives and takes intact. Level 3's proposal that the Commission impose on SBC the parts of the deal that Level 3 likes, but not those that it does not like, is absurd.

[59] See also SBC's discussion of IC Issue 13(a) (explaining that the *ISP Remand Order* remains the law today).

Moreover, because SBC has elected to use the *ISP Remand Order*'s compensation terms for ISP-bound traffic, Level 3 has the option to require the parties to "exchange section 251(b)(5) traffic at that same rate" that applies to ISP-bound traffic. *ISP Remand Order*, ¶ 89. While SBC has proposed language that presumes Level 3 has elected to take advantage of this "mirroring" rule,[60] it is not clear whether Level 3 in fact wishes to invoke the mirroring rule. SBC's proposed Sections 5.2-5.5 come into play only if Level 3 *rejects* SBC's offer to exchange section 251(b)(5) traffic at the same rates, terms and conditions that apply to ISP-bound traffic under the provisions of the *ISP Remand Order* ($0.0007 per minute).

Issue 10(c). If Level 3 does not choose to mirror the rates for ISP-bound traffic, then a bifurcated rate structure should apply to section 251(b)(5) traffic, as provided in SBC's proposed Section 5.2. 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. SBC Ex. 7.0 (McPhee Direct) at 40-41. The costs for both functions are known (and are not directly at issue here). These costs could be recovered by a "unitary" rate or by a "bifurcated" rate. A "unitary" rate is a simple per-minute rate, calculated by spreading 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*. *Id*. 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, 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.

[60] *See* SBC § 6.1 ("the following rates, terms and conditions set forth in Sections 6.2 through 6.6 shall apply to the termination of all Section 251(b)(5) Traffic and all ISP-Bound Traffic").

> 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.

If a unitary rate is used, 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¢. 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.

Moreover, while a unitary rate may appear "fair" on the whole and on the average, that remains the case only if the average call duration used to determine the unitary rate remains the same. But "the characteristics of telephone calls have evolved dramatically over the past several years" (SBC Ex. 7.0 (McPhee Direct) at 40), and may continue to evolve. As a result, the benefit of the simplicity provided by the unitary approach is 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 obvious: 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.

Adoption of the bifurcated approach should be uncontroversial, because it indisputably yields more precise costs, and therefore fairer and more accurate rates, than the unitary approach. SBC Ex. 7.0 (McPhee Direct) at 40-41. Thus, in the event that Level 3 does not opt to use the ISP-bound traffic rate ($0.0007 per minute) for section 251(b)(5) traffic, the Commission should adopt SBC's proposed bifurcated reciprocal compensation rate for such traffic. There can be no question but that it will yield more accurate rates than a unitary rate structure, and Level 3 has articulated no plausible objection to it, because there is none.

Issue 10(d). In the event that Level 3 rejects SBC's offer, then Sections 5.2-5.5 set forth the appropriate rate structure for reciprocal compensation for section 251(b)(5) traffic, because in such an event the standard reciprocal compensation provisions should apply. Sections 5.3 and 5.4, for instance, set forth the four standard reciprocal compensation rate elements: three tandem serving rate elements (tandem switching, tandem transport, and end office switching in a tandem serving arrangement) and one end office serving rate element (end office switching). If Level 3 does not opt to take advantage of the *ISP Remand Order*'s mirroring rule, then these industry-standard reciprocal compensation rate elements should apply. *See* SBC Ex. 7.0 (McPhee Direct) at 38-39.

Issue 10(e). Finally, if Level 3 chooses not to take advantage of the mirroring rule, then the parties' contract should provide that Level 3 is entitled to the end office serving rate element only, and not the tandem serving rate elements. Appendix IC, SBC § 5.5. This issue is governed by 47 C.F.R. § 51.711(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 Level 3 has proven that its switch serves a geographic area comparable to the area served by an SBC tandem switch. Level 3 has not even attempted to offer such proof. Thus, Level 3 is entitled only to the end office service rate element.

Transit Traffic (Appendix IC, L3 § 5.2.2).[61] Level 3 proposes to include language in the parties' Appendix IC addressing intercarrier compensation for "Transit Traffic." This issue is discussed fully under ITR Issues 5 through 9 (which discussion is fully incorporated by reference herein), where SBC explains that transiting is not required by the Act and is thus not subject to arbitration under Section 252 of the Act. Thus, Level 3's proposals concerning transiting should not be included in the parties' interconnection agreement.

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[61] In the DPL, SBC identified transiting as the subject of IC Issues 11(e) and 11(f). Level 3's proposed Section 5.2.2, however, which concerns transiting, was listed under IC Issue 10. Thus, SBC discusses the issue here.

IC ISSUE 11:

(A) WHAT IS THE APPROPRIATE FORM OF INTERCARRIER COMPENSATION FOR FX AND FX-LIKE TRAFFIC, INCLUDING ISP FX TRAFFIC?

(B) WHAT IS THE APPROPRIATE FORM OF INTERCARRIER COMPENSATION FOR OPTIONAL EAS TRAFFIC?

(C) IS IT APPROPRIATE TO INCLUDE ALL INTRALATA TOLL TRAFFIC UNDER AN MPB AGREEMENT?

(D) WHAT IS THE APPROPRIATE TREATMENT AND FORM OF INTERCARRIER COMPENSATION FOR INTRALATA 8YY TRAFFIC?

(E) SHOULD NON-SECTION 251/252 SERVICES SUCH AS TRANSIT SERVICES BE ARBITRATED IN THIS SECTION 251/252 PROCEEDING?

(F) SHOULD SBC BE REQUIRED TO USE LEVEL 3 AS A TRANSIT PROVIDER TO REACH THIRD PARTIES THAT ARE ALREADY INTERCONNECTED WITH SBC?

ICA Reference: Appendix IC §§ 7.2, 8.1, 8.2, 8.3, 14, 14.1

IC Issue 11(a). As described above under IC Issue 3, section 251(b)(5) requires the payment of reciprocal compensation only for traffic that originates and terminates to end users physically located in the same local exchange area. While FX traffic works a fiction by making a caller believe she is making a local call, in fact FX traffic originates and terminates in *different* local exchange areas. *See* SBC Ex. 7.0 (McPhee Direct) at 16-18. And, as the FCC has held, "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area," while "[t]raffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges." *Local Competition Order*, ¶¶ 1034-35. Level 3's proposal to rate calls solely by NPA-NXX, without regard to the actual physical location at which the call terminates, simply does not reflect the FCC's rules.

Level 3 asserts that FX traffic should be treated as local traffic subject to section 251(b)(5) because "SBC's costs are limited to the cost of getting the calls to and from the POI, and remain the same regardless of the distance the traffic is carriers beyond the POI," and thus "SBC's costs associated with an FX call to a Level 3 customer are identical to the costs associated with any local call to a Level 3 customer." Level 3 Ex. 3.0 (Gates Direct) at 46. That proves nothing. The same could be said of a call that SBC delivers to the POI that everyone agrees is clearly an interstate interexchange call, such as a traditional long distance call. Such a call may not entail different costs from SBC's perspective but, as a matter of law, such calls are not subject to reciprocal compensation under section 251(b)(5).

At most, all Level 3's testimony shows is that the current reciprocal compensation and access charge regime may not be entirely economically rational – which is why the FCC has undertaken "a fundamental re-examination of all currently regulated forms of intercarrier compensation" with an eye toward "identifying a unified approach to intercarrier compensation that would apply to all types of traffic and to interconnection arrangements between all types of carriers." *Core Forbearance Order*, ¶ 1. In the meantime, however, the Commission must apply *current* federal law, and should adhere to its own precedents (*see* IC Issue 3 above) which, for purposes of intercarrier compensation, distinguishes between calls based on whether or not the call terminates in a different local exchange area than that in which it originated.

IC Issue 11(b). IC Issue 11(b) concerns compensation for the exchange of "Optional Calling Area" ("OCA") traffic. Appendix IC §§ 8.1, 8.2, 8.3. OCAs exist only in Arkansas, Kansas, and Texas, and thus these provisions do not apply here.

IC Issue 11(c). This issue, concerning whether it is appropriate to include all intraLATA toll traffic under a Meet Point Billing arrangement, is discussed under IC Issues 19 and 20.

IC Issue 11(d). This issue, concerning the appropriate compensation mechanism for 8YY traffic,[62] is discussed under IC Issue 18.

IC Issue 11(e) and 11(f). These issues concern transiting, and are addressed under ITR Issues 5 through 9.

IC ISSUE 12: WHAT IS THE APPROPRIATE FORM OF INTERCARRIER COMPENSATION FOR UNBUNDLED LOCAL SWITCHING TRAFFIC?

ICA Reference: Appendix IC §§ 5.7.1 – 5.7.4

IC Issue 12 concerns language proposed by SBC, and opposed by Level 3, that specifies the applicability of reciprocal compensation when Level 3 leases unbundled local switching ("ULS") from SBC. SBC's proposed Section 5.7.2 specifies that reciprocal compensation is due for *inter*switch section 251(b)(5) and ISP-bound traffic exchanged by the parties where Level 3 leases ULS from SBC. SBC's language is intended to ensure that UNE-P traffic is compensated the same as traffic that originates and/or terminates via a facilities-based provider. *See* SBC Ex. 7.0 (McPhee Direct) at 14-15.

An interswitch call is one that travels between at least two switches. An intraswitch call, on the other hand, is originated and terminated by a single switch – *i.e.*, the calling and called party are both served by the same end office switch. In the case of an interswitch call where Level 3 leases ULS, compensation for section 251(b)(5) traffic and ISP-bound traffic is clearly due because Level 3 uses its switch (leased from SBC) to originate the call, and SBC then terminates the call using SBC's switch (or vice versa). Requiring reciprocal compensation in such circumstances ensures that UNE-P traffic is treated in the same manner as the traffic of a

[62] "8YY" refers generically to toll-free numbers, such as "800" service. SBC Ex. 3.0 (Douglas Direct) at 8.

facilities-based provider. If Level 3 actually owned the switch, rather than leasing it from SBC, there is no dispute that reciprocal compensation would apply.

In the case of an intraswitch call where Level 3 leases ULS, on the other hand, no compensation should be due, because there is no hand-off of the call from one party's switch to the other's. That is, there are no costs for the "terminating carrier" to recover, because there is no point of switching on the terminating carrier's network. Rather, the originating carrier's switch handles all the switching functions necessary to complete the call. *See Local Competition Order*, ¶ 1034 ("reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call"). Again, SBC's proposal ensures that UNE-P traffic is compensated the same as traffic that originates and/or terminates via a facilities-based provider. If Level 3 actually owned the switch, rather than leasing it from SBC, and completed an intraswitch call using its switch, then no reciprocal compensation would be due to any carrier.

Level 3's objection to SBC's proposed Section 5.7.2 is without merit. Level 3 asserts that the FCC's *Interim Order* freezes the parties' existing contract terms regarding intercarrier compensation for traffic exchanged by the parties where Level 3 leases ULS. Level 3 is wrong.

The *Interim Order* requires SBC to continue for a limited time to provide CLECs unbundled access to mass market switching, high-capacity loops, and dedicated transport "under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." *Interim Order*, ¶¶ 1, 21. In particular, "[t]hese rates terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the

[FCC] or six months after Federal Register publication of this Order." *Id.*[63] The *Interim Order*'s "freeze" applies to the rates, terms, and conditions at which Level 3 is entitled to access mass market ULS. Intercarrier compensation, however, is not a rate, term, or condition of access to ULS. Rather, intercarrier compensation addresses the terms for the exchange of traffic between the parties. And nothing in the *Interim Order* indicates that the FCC intended to "freeze" rates, terms, or conditions for intercarrier compensation.[64]

Moreover, the 1996 Act draws a clear distinction between the rates and terms of access to UNEs, such as ULS, and the rates and terms governing intercarrier compensation, making clear that they are not one and the same. Section 251(b)(5) imposes a requirement on "*all* local exchange carriers" to establish "reciprocal compensation arrangements," while Section 251(c)(3) requires *incumbent* local exchange carriers to provide "unbundled access" to certain network elements. Similarly, Section 252(d)(1) contains the "pricing standards" "for network elements," while a different provision, Section 252(d)(2), contains standards for "charges for transport and termination of traffic." Accordingly, federal law requires that SBC's proposed language be adopted.

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[63] Three exceptions apply: where the June 15, 2004 rates, terms or conditions are superseded by "(1) voluntarily negotiated agreements, (2) an intervening [FCC] order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." *Interim Order*, ¶¶ 1, 21.

[64] Even if the *Interim Order*'s freeze did apply to intercarrier compensation terms, which it does not, that freeze would apply only to intercarrier compensation with respect to *mass market* switching, not enterprise switching. The FCC's interim rules do not apply to enterprise switching. At the outset of its *Interim Order*, the FCC made clear that its "references to unbundled switching encompass *mass market* local circuit switching," not enterprise switching. *Interim Order*, ¶ 1 n.3. And applying the interim rules to enterprise switching would make no sense. In the *TRO*, the FCC determined that CLECs are not impaired without access to enterprise switching, and thus enterprise switching is not subject to unbundling. *See* 47 C.F.R. § 51.319(d)(3). In *USTA II*, the D.C. Circuit *upheld* that determination. 359 F.3d at 587.

IC ISSUE 13:

(A) SHOULD THIS INTERCARRIER COMPENSATION APPENDIX INCLUDE SBC'S PROPOSED TERMS AND CONDITIONS CONCERNING APPLICATION OF THE FCC'S ISP COMPENSATION PLAN?

(B) SHOULD THE AGREEMENT PROVIDE FOR A GROWTH CAP ON THE COMPENSATION FOR ISP-BOUND TRAFFIC?

(C) SHOULD THE AGREEMENT PROVIDE FOR BILL AND KEEP FOR ISP-BOUND TRAFFIC IN NEW MARKETS?

(D) SHOULD THE AGREEMENT PROVIDE FOR A REBUTTABLE PRESUMPTION THAT IF THE SECTION 251(b)(5) TRAFFIC AND ISP-BOUND TRAFFIC EXCHANGED BETWEEN THE PARTIES EXCEED A 3:1 TERMINATING TO ORIGINATING RATIO, IT IS PRESUMED TO BE ISP-BOUND TRAFFIC SUBJECT TO THE COMPENSATION AND GROWTH CAP TERMS IN SECTION 6.3?

(E) SHOULD TERMS AND CONDITIONS BE INCLUDED IN THE AGREEMENT THAT PROVIDE THAT THE PARTY THAT TERMINATES MORE BILLABLE TRAFFIC MUST CALCULATE THE AMOUNT OF TRAFFIC TO BE COMPENSATED UNDER THE FCC PLAN AND THE AMOUNT OF TRAFFIC THAT IS SUBJECT TO BILL AND KEEP?

ICA Reference: Appendix IC §§ 6 – 7.5

IC Issue 13(a). IC Issue 13(a) concerns SBC's proposed Section 6, which implements the *ISP Remand Order*'s compensation plan for ISP-bound traffic (and section 251(b)(5) traffic, if Level 3 chooses to take advantage of the "mirroring" rule). Level 3 opposes implementation of the FCC's ISP-bound traffic compensation rules, basically asserting that the parties should not bother to implement the requirements of federal law with respect to ISP-bound traffic because those requirements may change in the near future. Instead, Level 3 asserts, the Commission should require the parties to re-adopt the provisions of their old contract governing ISP-bound traffic – provisions that were adopted by voluntary agreement and that manifestly do not reflect

the FCC's *ISP Remand Order* (a point that Level 3 does not deny). Level 3's position is without merit, and violates federal law.

As explained under IC Issue 10, Level 3 has no choice in the matter. SBC has invoked the FCC's compensation plan for ISP-bound traffic (*see* SBC Ex. 7.0 (McPhee Direct) at 9, 24-25), and thus the parties must conform to that plan.

Moreover, the FCC has recently confirmed that its *ISP Remand Order* remains the law today. In the *Core Forbearance Order*, the FCC *refused* to lift its rate caps for ISP-bound traffic, or its mirroring rule. The FCC reaffirmed "the continuing validity of the public interest rationale" behind its *ISP Remand Order*, and found "that the rate caps and mirroring rule remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities." *Core Forbearance Order*, ¶¶ 18-19. The FCC noted that "the rate caps and mirroring rule were implemented to prevent the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service, and to avoid arbitrage and discrimination between services," and concluded that "application of these rules is still 'necessary for the protection of consumers.'" *Id.* ¶ 25.

In short, the FCC's rate caps and mirroring rule for ISP-bound traffic remain fully effective federal law today, and that law cannot be ignored as Level 3 proposes. Level 3's scofflaw proposal is especially inappropriate given the FCC's reaffirmation that the ISP-bound traffic rate caps remain "necessary for the protection of consumers" and "necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications." *Id.* ¶¶ 19, 25.

IC Issue 13(b) and 13(c). In its recent *Core Forbearance Order* (¶ 1), the FCC granted forbearance to all carriers from application of the *ISP Remand Order*'s "growth caps" for compensable ISP-bound traffic and its "new markets" rule. Thus, the parties' agreement should

not reflect those growth caps or the new markets rule, and SBC withdraws Sections 6.3, 6.4, and 6.5 of its proposed language.

IC Issue 13(d). This issue concerns implementation of 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 presumption may be rebutted in proceedings before the state commission.

SBC's proposed contract language implements the *ISP Remand Order*'s 3:1 presumption. SBC § 6.6.1. *See* SBC Ex. 7.0 (McPhee Direct) at 30-34. Level 3 has not articulated any objection to this language, except for its general position that the parties should reprise the terms of their old contract rather than implement the *ISP Remand Order*. As explained above, Level 3's proposal is unlawful, and SBC's proposed language should be adopted.

IC Issue 13(e). Each party should be responsible for tracking and recording the traffic that party transports and terminates. *See* SBC Ex. 7.0 (McPhee Direct) at 34-35. In Section 6.7, SBC proposes that, each month, the party that transports and terminates more "billable traffic" (defined as all Section 251(b)(5) and ISP-bound traffic) will be responsible for calculating the amount of such traffic to be compensated and for invoicing the other carrier for the appropriate amount of compensation due. Level 3 has not articulated any objection to this language, except for its general position that the parties should repeat the terms of their old contract rather than

implement the *ISP Remand Order*. As explained above, Level 3's proposal is unlawful, and SBC's proposed language should be adopted.

IC ISSUE 14: **SHOULD THIS AGREEMENT SPECIFICALLY PROVIDE THAT RECIPROCAL COMPENSATION DOES NOT APPLY TO INTERSTATE OR INTRASTATE EXCHANGE ACCESS TRAFFIC, INFORMATION ACCESS TRAFFIC, EXCHANGE SERVICES FOR ACCESS, OR ANY OTHER TYPE OF TRAFFIC FOUND BY THE FCC OR THE COMMISSION TO BE EXEMPT FROM RECIPROCAL COMPENSATION?**

ICA Reference: Appendix IC § 7.1

As described above, 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. *See also id.* n. 66 (Section 251(b)(5) "exclude[s] traffic subject to . . . intrastate access regulations" as well as interstate access regulations). Instead, such traffic remains subject to intrastate and interstate access tariffs.

SBC's proposed contract language properly implements this federal law, by specifying that "the compensation arrangements set forth in Section 5 and 6 of this Appendix [for Section 251(b)(5) and ISP-Bound Traffic] 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." Appendix IC, SBC § 7.1. Further, "[a]ll Exchange Access traffic and IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of applicable federal and state tariffs."

Id. This language is directly supported by the FCC's currently effective rules and Level 3 has failed to articulate its objection to this language.

Instead of making clear that reciprocal compensation does not apply to exchange access, information access, or exchange services for access, Level 3 proposes vague language stating that traffic that "is governed by the terms, rates and conditions contained in either party's filed and effective federal or state tariffs . . . will be governed by the rates, terms and conditions of either Party's tariff or of Level 3's terms, rates and conditions subject to Applicable Law." Appendix IC, L3 § 7.1. While it is not entirely clear what the reference to "Level 3's terms, rates and conditions" means, it appears that Level 3's language says nothing more than 'traffic governed by a tariff will be governed by a tariff.' This vague language should be rejected, because it utterly fails to clearly and unambiguously implement the FCC's effective rule that reciprocal compensation does not apply to "exchange access, information access, and exchange services for such access." *ISP Remand Order* ¶ 34.

IC ISSUE 15: WHAT IS THE APPROPRIATE TREATMENT AND COMPENSATION OF ISP TRAFFIC EXCHANGED BY THE PARTIES OUTSIDE OF THE LOCAL CALLING SCOPE?

ICA Reference: Appendix IC §§ 7.4 – 7.5

As described above under IC Issue 5, 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 (emphasis added). 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 other issues) implementing those rules.

Additionally, the parties' contract should also address the treatment of ISP traffic *not* covered by the FCC's *ISP Remand Order* – that is, traffic bound to an ISP outside the local calling area (as would occur if an end-user called long distance to its ISP). SBC has proposed such language (§§ 7.4 and 7.5), while Level 3 has not. SBC's proposed language is consistent with federal law, and should 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, *e.g.*, intraLATA or interLATA interexchange traffic, and remains subject to access tariffs. Similarly, an FX, Optional EAS, or 8YY call to an ISP remains FX, Optional EAS, or 8YY traffic. Thus, the contract should specify, as SBC proposes, that ISP calls that do not fall under the *ISP Remand Order*'s compensation plan, because the calls are "traded outside of the applicable local calling scope," remain subject to the routing and compensation arrangements that apply to the underlying traffic type (*e.g.*, interexchange, FX, Optional EAS, 8YY, or Feature Group A or D traffic).[65]

IC ISSUE 17: WHAT IS THE PROPER ROUTING AND TREATMENT OF INTRALATA TOLL TRAFFIC THAT IS SUBJECT TO A PRIMARY TOLL CARRIER (PTC) ARRANGEMENT?

ICA Reference: Appendix IC § 10.1

IC Issues 17 and 19 concern compensation for IntraLATA toll traffic. It is important to note that some end users select in advance a particular interexchange carrier to carry their intraLATA toll traffic. In the industry parlance, those end users have "presubscribed" their

[65] As noted above in connection with IC Issue 5, if FX traffic were subject to reciprocal compensation, then ISP-Bound FX traffic would be subject to the *ISP Remand Order* plan.

intraLATA toll traffic to that carrier. SBC Ex. 9.0 (Read Direct) at 3. To illustrate, assume that an end user served by Level 3 has designated MCI as its intraLATA toll carrier. When such an end user makes an intraLATA toll call to an end user served by SBC, Level 3 takes the call over its facilities and hands it off to MCI, which takes the call to SBC, the local carrier that serves the called party. *Id*. MCI bills its end user for the toll call, and the local carrier at each end (Level 3 and SBC, the "originating" and "terminating" carriers) bills the toll carrier access charges for its use of their local networks. SBC and Level 3 share the task of carrying the traffic to and from the toll carrier MCI, and accordingly share the access revenues from MCI under an arrangement known as "Meet Point Billing." *Id*. Compensation issues related to this situation are addressed in IC Issue 19.

IC Issue 17 addresses the situation in which the end user has *not* "presubscribed" its intraLATA toll calls to an interexchange carrier. In that case, the calling party's local exchange carrier (Level 3 in our example) takes the call directly to the carrier serving the called party, SBC. *Id*. at 2-3. There is no toll carrier in the middle, so there are no access revenues to share. Instead, Level 3 would bill the end user for the toll call, and then compensate SBC for terminating the call pursuant to Sections 10 and 14 of the Intercarrier Compensation appendix. In this example, Level 3 is described as the calling party's "Primary Toll Carrier" and the traffic is known as "LEC-to-LEC" traffic.[66] *Id*. at 3.

IC Issue 17 represents another refrain of Level 3's recurring theme, in which Level 3 seeks to combine traffic of all types on "local interconnection trunks," even though the various types of traffic are subject to different compensation methodologies. In this vein, Level 3

[66] Under circumstances as they exist today in Illinois, Level 3's position is not only wrong for the reasons discussed herein, it is irrelevant because there are no primary toll carrier arrangements applicable to SBC Illinois today.

proposes that Section 10.1 contain a caveat that primary toll carrier arrangements "in no way shall restrict either party from exchanging [intraLATA toll] traffic over the Parties' existing Local Interconnection Trunk groups." However, intraLATA toll traffic is not "Local Interconnection" traffic, is not compensated under the same methodology as "Local Interconnection" traffic, and does not belong on the same trunk groups as "Local Interconnection" traffic. Furthermore, mixing different traffic types that belong under different compensation regimes will likely result in inaccurate billing – and hinder SBC from detecting any improper attempt to evade access charges. SBC Ex. 9.0 (Read Direct) at 4. As Staff correctly points out, the Commission has previously rejected a proposal that would have required SBC to modify its systems so that a competing carrier (in that instance, AT&T) could combine local and intraLATA toll traffic with access traffic. Staff Ex. 1.0 (Zolnierek Direct) at 18 (citing Commission decision in Docket No. 03-0239). Likewise, the Proposed Decision in the arbitration between SBC and MCI rejected a "commingling" proposal similar to that advanced by Level 3 here, finding that "MCI has not persuaded the Commission to alter its previous decision on separate trunking." Oct. 29, 2004 Proposed Arbitration Decision, Docket No. 04-0469, at 106.

Level 3's proposed use of percentage factors, which would allocate traffic into different categories by estimate rather than by physically segregating and checking that traffic, is no solution to the problem Level 3 would cause. Such factors are used only for those (hopefully limited) exceptions in which the call record does not contain sufficient detail to assign a jurisdiction and rate; because the amount of traffic involved is relatively small, the dollar impact of an error in determining the factors is minimized. *Id.*; SBC Ex. 3.0 (Douglas Direct) at 5-6. Level 3 is trying to turn the exception into a rule, under which the parties would *intentionally*

make it impossible to determine the actual jurisdiction of a call in *all* cases, and as a result would be forced to use percentage allocations to rate *all* traffic, not just a small subset. SBC Ex. 9.0 (Read Direct) at 4; SBC Ex. 3.0 (Douglas Direct) at 6.

The Commission should also reject Level 3's contention that separate trunk groups, while necessary to facilitate accurate bills, would be inefficient. As SBC explains in connection with ITR Issue 11(A), Level 3 has already established separate trunk groups. Further, the Commission has no authority (particularly in this arbitration under Section 251 of the 1996 Act) to overturn the current trunking arrangement for toll traffic, which is governed by federal access tariffs, not by the Act. Moreover, the Proposed Decision in Docket No. 04-0469 finds – based on the recommendation of Staff – that MCI "failed to establish that the benefits of combined trunking, if any, outweigh the costs associated with the extra complexity in SBC's billing, or the extent of those costs." Oct. 29, 2004 Proposed Decision, Docket No. 04-0469, at 106.

IC ISSUE 18(A): FOR INTRALATA 800 CALLS, SHOULD THE AGREEMENT REQUIRE THE PARTIES TO PROVIDE 800 ACCESS DETAIL USAGE, OR SHOULD IT PERMIT THE PARTIES TO PROVIDE THE EQUIVALENT?

ICA Reference: Appendix IC § 11.1

SBC's witness explained that when one carrier provides services to another carrier, it often provides detailed information to that carrier regarding the service provided so that the receiving carrier can verify the provider's bill (and, if appropriate, bill its own end users in turn for the service). SBC Ex. 9.0 (Read Direct) at 5. Given the sheer number of carriers that provide services to and interact with other carriers in this fashion, inter-carrier communications would quickly degenerate into Babel unless all carriers agreed upon and used common formats. Accordingly, carriers participate in the Ordering and Billing Forum (which is open to all interested parties) to develop industry-wide formats for exchanging billing information. *Id*. The

alternative is chaos – a world in which every carrier develops its own "language" and then has to learn and keep track of all the dialects spoken by all the other carriers with which it does business.

As explained under IC Issue 18A, Level 3 is attempting to evade the order that the industry has worked hard to create and to replace it with chaos. When Level 3 asks or "queries" SBC's database of "800" numbers to locate a customer, SBC's switch records the request. *Id.* The recording is translated into the industry format developed by the Ordering and Billing Forum. This format is called Exchange Message Interface or "EMI." *Id*. at 5-6. SBC then sends the EMI-formatted record to Level 3 so that Level 3 can verify its bill from SBC or bill its own end user for triggering the query. *Id*. In Section 11.1 of the Agreement, SBC proposes that the parties provide each other with 800 Access Detail Usage information and IntraLATA 800 Copy Detail Usage in the standard EMI format. Level 3, however, wants to water down the standard, proposing that the parties can provide "equivalent" information in some "other mutually agreeable format."

The problem with Level 3's proposal is that there is no "equivalent" or "mutually agreeable" format, and Level 3 does not identify one. The whole reason that carriers establish industry standard-setting bodies, and then spend time participating in those organizations, is to create a *single* "agreeable" format, so that carriers know in advance what language to learn and use. SBC has designed its systems to work with the industry-standard format, and any new, non-standard format would require extensive modification to SBC's billing systems. SBC Ex. 9.0 (Read Direct) at 6. In any event, there is no need for the contract to provide for the possibility that the parties might discuss and agree upon some different format if such an agreement is warranted by future circumstances; contracting parties are always free to discuss and agree upon

a modification to their agreement. The Commission accordingly should reject Level 3's proposal.

IC ISSUE 18(B): WHAT IS THE APPROPRIATE TREATMENT AND FORM OF INTERCARRIER COMPENSATION FOR INTRALATA 8YY TRAFFIC THAT BEARS TRANSLATED NPA-NXX CODES THAT ARE LOCAL TO THE POINT WHERE THE TRAFFIC IS EXCHANGED?

ICA Reference: Appendix IC § 11.2

IC Issue 18B concerns "8YY" traffic. The term "8YY" refers generically to toll-free numbers like the familiar "800" service. 8YY service is an optional Feature Group D service available to carriers from SBC's access tariffs, and it enables calling parties to reach the 8YY subscriber (e.g. a national rental car company) without having to incur toll charges. As such, the overwhelming majority of traffic that goes to 8YY subscribers is likely to be toll traffic (as opposed to local traffic). Therefore, 8YY traffic should be assessed access charges (in lieu of reciprocal compensation).

Level 3 contends that it should not pay access charges but should instead *receive* intercarrier compensation from SBC, if the 800 number can be "translated" to an "NPA-NXX" phone number that looks local to the point where the traffic is exchanged. However, that approach virtually invites gaming. By looking for traffic that appears "local to the point where the traffic is exchanged," Level 3's proposal ignores the reality that a call may be exchanged between several carriers, and the true origin may not be local (and indeed, almost certainly is not local given the nature of 8YY calling). Finally, Level 3 already obtains compensation for 8YY traffic from its 8YY subscribers, by charging them a fee for 8YY service (the same way that SBC receives fees from its own 8YY subscribers).

IC ISSUE 19(A): IS LEVEL 3 REQUIRED TO FOLLOW THE ORDERING AND BILLING FORUM'S ("OBF'S) MULTIPLE EXCHANGE CARRIER ORDERING AND DESIGN (MECOD) AND MULTIPLE EXCHANGE CARRIER ACCESS BILLING (MECAB) DOCUMENTS FOR MEET-POINT BILLING?

ICA Reference: Appendix IC § 12

As with Issue 18A, IC Issue 19A concerns Level 3's attempt to evade industry standards for the exchange of information between carriers. For Meet Point Billing information (see issues 17 and 19B), the Ordering and Billing Forum has developed an industry standard known as "Multiple Exchange Carrier Access Billing" or "MECAB."[67] SBC Ex. 9.0 (Read Direct) at 7. The standard was written by industry participants in an open forum. *Id*. Level 3 itself acknowledges that MECAB "is the format used historically for access records that are exchanged between ILECs and IXCs." Level 3 Ex. 2.0 (Wilson Direct) at 37.

The agreed language for Sections 12.2, 12.3, 12.5, and 12.7 provides that the parties are to exchange information in the MECAB format. Level 3, however, proposes that Section 12.1 contain an exception, stating that the parties will "explore additional options" if "Level 3 is unable to provide records formatted according to [MECAB]." As with IC Issue 18A, SBC opposes Level 3's proposal, on the ground that there are no "additional options" short of a customized format for Level 3 – which would defeat the purpose of having and abiding by industry standards in the first place. Moreover, there is no need for the parties' agreement to include language that permits them to "explore additional options." If the parties want to explore different formats, they are always free to do so, whether or not their contract expressly

[67] Issue 19A also refers to an industry standard known as Multiple Exchange Carrier Ordering and Design ("MECOD") which pertains to ordering of access services. That standard is not actually at issue here, however, SBC Ex. 9.0 (Read Direct) at 6-7.

contemplates that possibility. And if both parties agree to use a specific different format, they can always reach such an agreement and modify their contract to reflect the agreement if and when it is reached.

IC ISSUE 19(B): WHAT IS THE APPROPRIATE FORM OF INTERCARRIER COMPENSATION FOR MBP TRAFFIC?

ICA Reference: Appendix IC §§ 12.1, 12.2, 12.3, 12.5

IC ISSUE 19(C): IS IT APPROPRIATE TO LIMIT MEET-POINT BILLING ARRANGEMENTS TO IXC SWITCHED ACCESS SERVICES TRAFFIC JOINTLY HANDLED BY THE PARTIES?

ICA Reference: Appendix IC §§ 12.1, 12.2, 12.3, 12.5

As noted under IC Issue 17, intraLATA toll calls can be grouped into two categories. If the end user making the call has selected or "presubscribed" an interexchange carrier to carry its intraLATA toll traffic, the caller's local exchange carrier takes the call to the toll carrier, which delivers the call to the called party's local carrier for termination. SBC Ex. 9.0 (Read Direct) at 2-3. The toll carrier bills the end user; the two local carriers charge the toll carrier for access to their networks, and they share the access revenues under a "Meet Point Billing" arrangement. *Id*. at 3. Alternatively, if the caller does not have an interexchange carrier for intraLATA toll, its local carrier takes the call to the local carrier that serves the call's recipient. *Id*. at 2-3. Under this second scenario, known as "LEC-to-LEC traffic," the caller's carrier bills the caller, and compensates the recipient's carrier for terminating the call. *Id*.

Level 3's proposed language for Sections 12.1, 12.2, 12.3, and 12.5 accounts for only one of these categories. Level 3 proposes that all "Circuit Switched Traffic" is to be handled via Meet Point Billing. But Meet Point Billing is a method for sharing access revenues. Plainly, it does not and cannot apply where there are no access revenues to share (that is, where there is no third-party toll carrier in the middle of the call). SBC Ex. 9.0 (Read Direct) at 3-4. Level 3 is

ignoring LEC-to-LEC traffic. By contrast, SBC's proposed language properly limits Meet Point Billing to "Switched Access" traffic, where the parties share access revenues and where Meet Point Billing is applicable.

IC ISSUE 19(D): IN THE EVENT OF A LOSS OF DATA, WHAT IS A REASONABLE TIME FRAME FOR BOTH PARTIES TO RECONSTRUCT THE LOST DATA?

ICA Reference: Appendix IC § 12.9

SBC has accepted Level 3's proposed 90-day period for this issue (SBC Ex. 9.0 (Read Direct) at 8), and thus there should be no remaining dispute.

IC ISSUE 20: (A) WHAT IS THE PROPER TREATMENT AND COMPENSATION FOR INTRALATA TOLL TRAFFIC?

(B) SHOULD LEVEL 3 BE PERMITTED TO CHARGE AN ACCESS RATE HIGHER THAN THE INCUMBENT?

(C) IS LEVEL 3 ELIGIBLE TO CHARGE A TANDEM INTERCONNECTION RATE FOR INTRALATA TOLL TRAFFIC?

ICA Reference: Appendix IC § 14.1

IC Issue 20(a). IC Issue 20(a) concerns Level 3's proposal to use its narrowly-defined term "Circuit-Switched Traffic." As described above under IC Issues 2 and 3, Level 3's proposed language is inappropriate and should be rejected. Intrastate access charges apply to all intrastate intraLATA toll traffic, and not just intraLATA toll traffic that meets Level 3's narrow definition of "Circuit-Switched Traffic."

IC Issue 20(b). IC Issue 20(b) concern SBC's proposed language in Section 14.1 stating that compensation for intraLATA toll traffic "shall not exceed the compensation contained in [the SBC] tariff in whose exchange area the End User is located." This language is intended to prevent Level 3 from charging an access rate for intraLATA toll traffic that is higher than SBC's

own tariffed rate. This language is appropriate and should be adopted, consistent with the Commission's resolution of the same issue in Docket No. 01-0338.

Level 3 is in effect asking the Commission to require SBC to pay Level 3 a per-minute access rate that Level 3 has supported with no evidence, that may or may not be cost-based, that is unregulated, and that Level 3 could change at any time. As explained in detail below, Level 3's request is untenable and must be rejected.

First, the record in this case does not contain any evidence as to what Level 3's switched access tariffed rates are, or whether they are cost-based, or whether they are the same as Level 3's interstate access rates. What is clear is that Level 3 is free to change its intrastate switched access tariff rate at any time without Commission approval or SBC input. That fact alone should be a sufficient basis for not requiring SBC to pay Level 3's intrastate switched access tariff rate, no matter its level. *See* SBC Ex. 7.0 (McPhee Direct) at 41-45.

The FCC's thinking on CLEC tariffed access rates, as expressed in the 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), is instructive. There, the FCC found 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 powerful indictment by the FCC of CLEC access rates, there is no legitimate basis for requiring SBC to pay Level 3's unstated, unsupported, and changeable-at-will rates. Instead, SBC should pay Level 3's tariffed switched access rates only so long as they are not higher than SBC's own tariffed switched access rates. That is exactly what the Commission required in its Arbitration Decision in *TDS Metrocom, Inc., Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company* (Docket 01-0338 Aug. 8, 2001):

> TDS was not able to show that its rates are cost-based.
>
> The Commission's decision is that TDS should charge Ameritech's tariffed rates for terminating access . . . until TDS is able to document it actual costs for terminating that toll traffic. TDS would be required to provide Ameritech with 30 days notice of a proposed change in its access tariffs and to provide Ameritech with the opportunity to have its cost experts to inspect the documentation used to justify its rates . . . .

Here, too, Level 3 made no attempt to show that its rates are cost-based.

Further, there is a compelling logic to SBC's proposal: under the FCC's rules, SBC pays Level 3 reciprocal compensation for local traffic at rates equal to the rates that SBC charges Level 3 for terminating Level 3-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 Level 3'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's tariffed switched access rates are a reasonable proxy for the rates that Level 3 should charge SBC for performing the same service, such that SBC should not have to pay Level 3 intraLATA toll access charges that are higher than SBC's own charges. *See* SBC Ex. 7.0 (McPhee Direct) at 41-45.

IC Issue 20(c). IC Issue 20(c) concerns Level 3's proposal to charge tandem rates for intraLATA toll traffic not just where Level 3's tandem switch is used to terminate traffic, but also where any "switch providing equivalent geographic coverage" is used to terminate traffic. L3 § 14.1. Level 3's language is inappropriate and should be rejected. The rate that Level 3 charges for intraLATA traffic is governed by Level 3's applicable switched access tariff, and Level 3 should charge the applicable rate elements as allowed by its tariff. *See* SBC Ex. 7.0 (McPhee Direct) at 45.

IC ISSUE 21:

(A) WHAT IS THE APPROPRIATE FORM OF INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC IN ACCORDANCE WITH THE FCC'S ISP TERMINATING COMPENSATION PLAN?

(B) SHOULD SBC PROVIDE LEVEL 3 WITH ORIGINATING CARRIER NUMBER ON CALLS THAT LEVEL 3 CANNOT BILL THROUGH THE USE OF TERMINATING RECORDS?

(C) FOR BILLING PURPOSES, SHOULD ISP-BOUND TRAFFIC BE CALCULATED USING THE 3:1 PRESUMPTION?

ICA Reference: Appendix IC §§ 15, 15.1, 15.2

Issue 21(a) and 21(c). These issues concern section 15.2, in which SBC proposes to state that where it "has offered to exchange Section 251(b)(5) Traffic and ISP-Bound traffic pursuant to the FCC's interim ISP terminating compensation plan set forth in the FCC ISP

Compensation Order, ISP-Bound Traffic will be calculated using the 3:1 Presumption as set forth in section 6.6 of this Appendix." This language appropriately implements the *ISP Remand Order*, and should be adopted. As described above under IC Issues 10 and 13 (which discussion is fully incorporated by reference herein), SBC federal law does not allow Level 3 to evade the *ISP Remand Order*'s compensation plan for ISP-bound traffic, once SBC has elected to invoke that plan which it has in Illinois. Level 3's proposal that the parties agree only to implement *future* FCC orders, and ignore the *ISP Remand Order*'s compensation plan, violates federal law.

Issue 21(b). This issue concerns section 15.1.1, which provides: "Where a terminating Level 3 is not technically capable of billing the originating carrier through the use of terminating records, [SBC] will provide the appropriate originating Category of records **including Originating Carrier Number ("OCN")**." The language that appears in bold and underline, which has been proposed by Level 3, should be rejected.

OCN is not the proper record from which carriers bill intercarrier traffic; rather, Calling Party Number ("CPN") is used to assign traffic to the appropriate jurisdiction. SBC Ex. 7.0 (McPhee Direct) at 37. OCN is not appropriate for that purpose, because it is not part of the actual call transmission. *Id.* For the purposes of billing compensation to the appropriate party, facility-based CLECs receive the appropriate category of records for calls that terminate to end users served by a CLEC utilizing SBC's unbundled local switching, which will contain the OCN to aid them in billing the proper party. *Id.* In addition, the CLEC may utilize the Local Exchange Routing Guide ("LERG") and the Local Number Portability ("LNP") Database to help identify the appropriate party to bill. *Id.*

IC ISSUE 22: **SHOULD THE AGREEMENT INCLUDE SBC'S PROPOSED RESERVATION OF RIGHTS CONCERNING INTERCARRIER COMPENSATION ON ISP-BOUND TRAFFIC AND THE FCC'S ISP COMPENSATION ORDER?**

ICA Reference: Appendix IC §§ 18.1 – 18.6

IC Issue 22 concerns specific reservation of rights and intervening law language proposed by SBC in light of the FCC's pending *Unified Intercarrier Compensation NPRM*.[68] Given that pending rulemaking and the unique administrative aspects of intercarrier compensation, a special reservation of rights and intervening law provision is appropriate to address forthcoming changes from the FCC.

At the same time that the FCC issued its *ISP Remand Order*, it also issued a Notice of Proposed Rulemaking ("NPRM") to address intercarrier compensation on a more general basis. The FCC recognized that current market distortions in the intercarrier compensation regime would not be completely addressed within the *ISP Remand Order* regarding the treatment of ISP-Bound Traffic:

> We recognize that the existing intercarrier compensation mechanism for the delivery of this traffic, in which the originating carrier pays the carrier that serves the ISP, has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets. As we discuss in the *Unified Intercarrier Compensation NPRM,* released in tandem with this Order, such market distortions relate not only to ISP-bound traffic, but may result from any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users. Thus, the *NPRM* initiates a proceeding to consider, among other things, whether the Commission should replace existing intercarrier compensation

[68] Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132 (rel. Apr. 27, 2001) ("*Unified Intercarrier Compensation NPRM*" or "*NPRM*").

> schemes with some form of what has come to be known as "bill and keep." The *NPRM* also considers modifications to existing payment regimes, in which the calling party's network pays the terminating network, that might limit the potential for market distortion. *ISP Remand Order*, ¶ 2.

In reality, then, the FCC's *NPRM* is a continuation of the FCC's *ISP Remand Order*. It will provide long-term guidance as to the treatment of intercarrier traffic in addition to the interim remedies offered in the *ISP Remand Order*:

> Because the record indicates a need for immediate action with respect to ISP-bound traffic, however, in this Order we will implement an interim recovery scheme that: (i) moves aggressively to eliminate arbitrage opportunities presented by the existing recovery mechanism for ISP-bound traffic by lowering payments and capping growth; and (ii) initiates a 36-month transition towards a complete bill and keep recovery mechanism while retaining the ability to adopt an alternative mechanism based upon a more extensive evaluation in the *NPRM* proceeding. *ISP Remand Order*, ¶ 17.

Thus, the parties' agreement should contain provisions that expressly acknowledge the FCC's *NPRM*, including language that addresses how the FCC's order resulting from that *NPRM* should be implemented. The FCC clearly acknowledged within the *ISP Remand Order* that the compensation mechanism contained in that Order was meant to be interim, with more direction to follow as a result of the *NPRM*, and the FCC clearly intends to further review and potentially revise intercarrier compensation. The parties' agreement should include contractual terms to ensure a smooth transition to whatever changes the FCC orders. By acknowledging that a change of law event is imminent upon release of the FCC's pending intercarrier compensation order, the parties can continue to operate with contractual certainty as to when and how that order will be implemented. *See* SBC Ex. 7.0 (McPhee Direct) at 51-53.

E. INTERCONNECTION (ITR) ISSUES

ITR ISSUE 1: **SHOULD THE LIST OF TYPES OF TRAFFIC THAT WILL BE CARRIED OVER TRUNK GROUPS INCLUDE "TELECOMMUNICATIONS TRAFFIC" OR "SECTION 251(b)(5) TRAFFIC, ISP BOUND TRAFFIC, INTRALATA TOLL [AND] INTERLATA 'MEET POINT'" TRAFFIC?**

ICA Reference: Appendix ITR § 1.2

The disputed language for ITR Issue 1, with SBC's proposed language in bold italic and Level 3's proposed language in bold underline, is as follows:

> The paragraphs below describe the required and optional trunk groups for the exchange of ***Section 251(b)(5) Traffic,*** **Telecommunications Traffic**, ***ISP Bound Traffic, IntraLATA toll, InterLATA 'meet point',*** mass calling, E011, Operator Services and Directory Assistance traffic.

The ITR Appendix does not (and should not) address *all* traffic exchanged between the parties, as Level 3's proposed language suggests. For example, the ITR Appendix should not address transit traffic because transit traffic, as discussed elsewhere, is not within the scope of section 251(b) or 251(c). Nor should it include interexchange access traffic, which Level 3 exchanges with SBC in its (Level 3's) capacity as an interexchange carrier ("IXC"). One reason is that Level 3's relationship with SBC, and its rights and obligations vis-à-vis SBC, where Level 3 is acting in its capacity as an IXC, are governed by access tariffs (state and federal), and not by a section 251/252 interconnection agreement. This is explained fully in the SBC position statement for ITR Issue 11(a). Another reason is that the traffic exchanged between SBC and Level 3 (where Level 3 is acting an as IXC) – interexchange traffic – is not the kind of traffic ("telephone exchange" and "exchange access") for which interconnection is required under section 251(c)(2). *Local Competition,* ¶ 191. This is explained fully in SBC's position statement for NIM Issue 1 and ITR Issue 11(a). The purpose of this arbitration – and of the

interconnection agreement it will produce – is to implement the requirements of section 251(b) and (c). *See,* 47 U.S.C. § 252(a) (stating that an ILEC has "a duty to negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5)" of section 251(b) and (c) of the 1996 Act); 47 U.S.C. § 252(e)(6) (stating that an aggrieved party may bring an action to determine whether the agreement "meets the requirements" of section 251 and 252 of the Act). Because Level 3's proposed language seeks to implement requirements that do not fall within the parameters of section 251(b) and (c), that language should be rejected.

ITR ISSUE 2: SHOULD LOCAL INTERCONNECTION TRUNK GROUPS AND MEET POINT TRUNK GROUPS BE LIMITED TO THE EXCHANGE OF TRAFFIC BETWEEN THE PARTIES' END USERS?

ICA Reference: Appendix ITR § 3.3

Issue 2 is similar to ITR Issue 11(a), and SBC's proposed language should be adopted and Level 3's rejected for the reasons stated therein.

ITR ISSUE 3: SHOULD THE AGREEMENT PROVIDE THAT THE PARTIES MAY MIGRATE TRUNKS NOT ONLY VIA THE INTERCONNECTION METHODS DESCRIBED IN APPENDIX NIM, BUT ALSO AS PERMITTED BY APPLICABLE LAW?

ICA Reference: Appendix ITR § 3.6

Level 3's proposed language for section 3.6 of the ITR Appendix should be rejected for the same reasons explained in connection with issues GT&C 6, GT&C Def. 15, and NIM 7. Specifically, to the extent that there is any pertinent "applicable law," Level 3 should have brought – and presumably did bring – that law to the Commission's attention in its testimony and advocated its express inclusion in the Agreement; and to the extent that Level 3 is concerned that some "applicable law" may come into existence in the future and should be taken into account,

that concern is already addressed by the intervening law provision in the Agreement. Moreover, SBC's is required to – and has every intention of – complying with all applicable law. If SBC fails to do so, it would – by definition – face whatever consequences the law affords for violations. Accordingly, Level 3's vague reference to "applicable law" is unnecessary and would do nothing but add confusion to the interconnection agreement.

ITR ISSUE 4(A): SHOULD LEVEL 3 BE REQUIRED TO TRUNK TO EACH TANDEM IN THE LATA?

ICA Reference: Appendix ITR § 4.2

SBC proposes language in Section 4.2 of the ITR appendix that would require Level 3 to establish local interconnection trunk groups to each SBC tandem and Meet Point trunk groups to each SBC access tandem where Level 3 has opened NXX codes (*i.e.,* established local phone numbers for its customers). This language should not be disputed (and Issue 4(a) should be resolved) because Level 3 has already established these trunk groups pursuant to the parties' prior interconnection agreement and Level 3 has agreed to maintain those trunk groups pursuant to settlement of various issues in this case. Level 3's proposed language, which contradicts the parties' actual agreement, should be rejected. Putting that aside, Level 3's proposed language permitting a carrier to bring all traffic to a single tandem would be wasteful of trunks and tandem capacity, and therefore should be rejected. SBC's arguments are discussed separately below.

A. AS A PRACTICAL MATTER, ITR ISSUE 4(A) IS RESOLVED BECAUSE LEVEL 3 HAS AGREED TO MAINTAIN LOCAL INTERCONNECTION TRUNK GROUPS TO EACH TANDEM AND MEET PONIT TRUNK GROUPS TO EACH ACCESS TANDEM WHERE IT HAS CUSTOMERS.

Level 3 has already established local interconnection trunk groups to each SBC tandem and Meet Point trunk groups to each SBC access tandem where it has customers. SBC Ex. 1.1P (Albright Supp) at 2. It did so pursuant to sections 5.3 and 5.4 of the ITR Appendix to the parties' current interconnection agreement and section 3.1 of the Amendment to Level 3 Contract

Superseding Certain Compensation Interconnection and Trunking Provisions, Interconnection and Trunking Provisions. In Section 5.4.1 of the ITR Appendix to the parties' existing interconnection agreement, Level 3 agreed to establish a Meet Point trunk group separate from the local interconnection trunk group: "InterLATA traffic shall be transported between CLEC switch and the SBC-13STATE Access or combined local/Access Tandem over a 'meet point' trunk group separate from local and IntraLATA toll traffic." And in Section 5.4.3 of the ITR Appendix to the parties' existing interconnection agreement, Level 3 agreed to establish Meet Point trunk groups at every SBC access tandem: "When SBC-13STATE has more than one Access Tandem in a local exchange area of LATA, CLEC shall establish an InterLATA [*i.e.,* meet point] trunk group to each SBC-13STATE Access Tandem where the CLEC has homed its NXX code(s)." In Section 3.1 of the Amendment to Level 3 Contract Superseding Certain Compensation, Interconnection and Trunking Provisions, Level 3 agreed to establish a POI at each tandem where it has established a working telephone number, which translates into Level 3 establishing local interconnection trunk groups to each SBC tandem where it has customers.

Furthermore, Level 3 has agreed to maintain the existing configuration whereby it has established Meet Point trunk groups to each SBC access tandem and a POI at (and local interconnection trunk groups to) each SBC tandem where it has customers. Tr. (Wilson) at 232, 235. And in the California arbitration, Level 3 witness Roger DuCloo acknowledged that Level 3 has established a POI at each SBC tandem where it has opened NXX codes (Cal. Tr. at 83) and that, pursuant to the parties' settlement of NIM Issues 2, 3, and 4, Level 3 has agreed to keep those POIs in place (Cal Tr. at 180). Mr. DuCloo further testified that Level 3 would establish direct trunks to any SBC tandem when traffic reaches a 1 DS1 level (Cal. Tr. at 240-241), and

that Level 3 would not open NXX codes behind a tandem unless it anticipated reaching the one DS1 level virtually immediately (Cal. Tr. at 241).

Although as a practical matter Level 3 has agreed to SBC's proposal by agreeing to maintain the current arrangement, it proposes language that would require SBC to accept all of a carrier's traffic at a single tandem. That language should be rejected not only because it plainly contradicts the parties' actual agreement here, but also for the reasons set forth below.

B. LEVEL 3'S PROPOSED LANGUAGE REQUIRING SBC TO ACCEPT ALL OF A CARRIER'S TRAFFIC AT A SINGLE TANDEM SHOULD NOT BE INCLUDED IN THE ICA BECAUSE SUCH A REQUIREMENT WOULD BE WASTEFUL OF TRUNKS AND TANDEM CAPACITY.

While the issue is largely academic in light of Level 3's agreement to maintain its existing trunk groups, Level 3's proposed language would have to be rejected even absent that agreement. To begin with, Level 3's proposed language requiring SBC to accept all of a carrier's traffic at a single tandem would (particularly in the case of large carriers) use all the capacity at that tandem – leaving no capacity for other carriers. SBC Ex. 1.0 (Albright Direct) at 32-33, 40-41. It would also require SBC to "double tandem" traffic, meaning that traffic would have to be switched at two tandems, rather than a single tandem, as would be the case if the carrier directed the traffic right to the tandem (*i.e.,* the one that serves the called party) in the first place. *Id.* at 32-33. Because Level 3's proposal would be wasteful of trunks and wasteful of tandem capacity (*id.* at 33), it should be rejected.

A tandem is a switch that connects multiple end office switches. *Id*. at 10. Where there is enough traffic to justify it, trunks may directly connect one end office switch to another. *Id.* at 73. But there is not always enough traffic between two end offices to justify a direct trunking arrangement, so end offices often connect to tandem switches. *Id.* at 12-13. A tandem switch has a finite capacity. *Id.* at 40-41. At about 100,000 trunks, a tandem reaches its limit and

another tandem has to be deployed. *Id.* at 41. Installation of a new tandem not only imposes costs on SBC, but also imposes additional cost on the entire industry because all carriers using the tandems must establish additional connections to route into the new tandem. *Id.* at 41-42. 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. *Id.* at 41. The more tandems there are in an area, the more trunks are required to connect them to each other and the fewer trunks are available for additional traffic. *Id.*

Furthermore, when switches such as Level 3's have a large amount of dedicated traffic to several tandems, routing all traffic through a single tandem (as Level 3 proposes here) would be wasteful of trunks. SBC Ex. 1.0 (Albright Direct) at 32-33. Using any tandem ties up two trunks: the one coming in from Level 3 and the one going out to an end office or another tandem. But if the outgoing trunk group routes a call to another tandem to get to another end office (the other tandem Level 3 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 Level 3 and a 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. *Id.* at 4, 33-34. Such inefficient use of trunks could result in premature tandem exhaust. *Id.* at 32.

In addition, having Level 3 connect to only one SBC tandem is not an efficient method of delivering calls from Level 3 to other SBC customers in the LATA, as it would require SBC to "double switch" calls. SBC Ex. 1.0 (Albright Direct) at 32-33. More specifically, if Level 3 only establishes a trunk group to the tandem that is near the POI, only those calls to SBC customers that are behind that tandem can be efficiently delivered. *Id.* at 32. Calls to such customers are switched once by the first tandem to the customer's end office for completion. *Id.*

However, calls destined for SBC customers behind other tandems would have to be "double switched" – *i.e.,* switched at the first tandem to redirect the call to the proper tandem, then switched a second time at the second tandem to the customer's end office for completion. *Id.* "Double switching" places an immediate burden on SBC in the form of additional points of switching and additional tandem trunk ports for each call to the distant tandems. *Id.* In addition, "double switching" Level 3's traffic from one tandem to another would accelerate tandem exhaust, leading to more frequent tandem switch growth and the need to purchase additional tandems. *Id.*

In contrast to Level 3's proposal, SBC's proposal minimizes tandem exhaust by requiring Level 3 to provision trunk groups to each SBC tandem in a LATA. SBC Ex. 1.0 (Albright Direct) at 33. This is no more than what is done by other CLECs that interconnect with SBC and is no more than what Level 3 itself does today. *Id*.

Level 3's argument that SBC's proposal would cause it to incur more costs is not true. SBC Ex. 1.0 (Albright Direct) at 33. SBC's proposal would only obligate Level 3 to provision *trunks*, not *facilities. Id.* at 6, 32. The *facility* is the end-to-end physical path, such as a DS1, DS3 or OC3. *Id.* at 3. The *trunk*, on the other hand, is a dedicated talk path that is provisioned in the switch. *Id.* SBC's proposal does not require Level 3 to incur any additional *facilities* expense – it simply requires Level 3 to maintain trunks. *Id.* at 5, 32-33. Moreover, the purported "economic disadvantage" Level 3 will face if "forc[ed] [ ] to incur the costs of more trunks" (Level 3 Ex 3.0 (Gates Direct) at 31) is nonexistent. To begin with, SBC does not bill Level 3 for trunks; when a carrier purchases a switch, the switch is equipped with a certain amount of trunks, engineered based on the number of subscriber lines it serves. SBC Ex. 1.0 (Albright Direct) at 6. More importantly, Level 3 has already established the requisite trunks to each

tandem where it has customers. *See* sections 5.3 and 5.4 of the ITR Appendix to the parties' current ICA; SBC Ex. 1.1P (Albright Supp) at 2. Thus, there will be no additional cost to Level 3.

Additionally, Level 3's position statement in the ITR DPL suggests that Level 3 contends carriers should be permitted to establish trunks to only one tandem in a LATA because, under the law, CLECs can choose to establish a single point of interconnection (POI) in each LATA. Level 3 is mixing apples with oranges – *i.e.,* it is confusing the parties' financial responsibility for facilities to the POI with the parties' financial responsibility for trunking. Trunking to a point in the network does not create a POI, and financial responsibility for trunks is not related to the POI. SBC Ex. 1.0 (Albright Direct) at 5. A POI is created only when Level 3's facilities are physically connected to SBC's network. *Id.* SBC picks up the burden of the transport facilities on its side of the POI and Level 3 is responsible for the transport facilities on its side of the POI. *Id.* at 18-19, 33. The parties' financial responsibility for facilities, however, is separate and apart from trunks. *Id.* at 3-6, 44-45. And the fact that Level 3 can choose a single point of interconnection (the point where *facilities* are interconnected) is irrelevant to whether Level 3 should be required to establish *trunks* to each tandem. *Id.* at 3-6, 46-47.

For all these reasons, the Commission should adopt SBC's proposed language for ITR Section 4.2.

ITR ISSUE 4(B): SHOULD THE ITR APPENDIX STATE THAT THE PARTIES' FINANCIAL RESPONSIBILITY FOR TRUNKING IS SET FORTH IN APPENDIX NIM?

ICA Reference: Appendix ITR § 4.2

The dispute on ITR Issue 4(b) concerns Level 3's proposed language for section 4.2 in bold, underline:

> When Tandem trunks are deployed LEVEL 3 shall connect to **only those tandems that are within the calling scope of the NPA NXX codes assigned to LEVEL 3 that would subtend to a particular tandem and so long as the financial responsibility for establishing such trunks is in accord with parties' responsibilities to establish and pay for transporting their originating traffic to the POI as specified in Section 2.0 NIM.**

Level 3's proposed language confuses the parties' financial responsibility for facilities to the POI with the parties' financial responsibility for trunking. SBC Ex. 1.0 (Albright Direct) at 3-6. The ITR appendix addresses issues relating to trunking, and the NIM appendix addresses the parties' responsibilities for facilities to the POI. *Id.* at 44-45. Contrary to Level 3's proposed language, financial responsibility for trunks is not related to the POI. *Id.* at 3-6, 45-46. In addition, Level 3's language relating to financial responsibility for trunks is not appropriate because there are no charges associated with trunk orders. *Id.* at 6.

ITR ISSUES 5, 6, 7, 8, & 9: IS A NON-SECTION 251 SERVICE – TRANSIT SERVICE, IN THIS INSTANCE – SUBJECT TO ARBITRATION UNDER 252 OF THE 1996 ACT?

ICA Reference: Appendix ITR §§ 4.3, 4.3.1, 4.3.2, 4.3.3, 4.3.4

ITR Issues 5 through 9 (as well as IC Issue 10) relate to Level 3's attempt to include transiting obligations in the interconnection agreement. Transiting is where SBC acts as a middleman to transport traffic between Level 3 and a third party carrier. That is, transit traffic originates on Level 3's network, is handed off by Level 3 to SBC, and is then handed off by SBC to a third party carrier for termination on its network; or, conversely, the traffic moves in the opposite direction, from a third party carrier, through SBC's network, for termination on Level 3's network. SBC Ex. 1.0 (Albright Direct) at 59. In both cases, SBC merely serves as a transport provider between the two networks and does not become financially obligated to the terminating carrier (whether Level 3 or the third party carrier) for reciprocal compensation; the

originating carrier (whether Level 3 or the third party carrier) remains obligated to pay such compensation to the terminating carrier. *Id.* at 59-60.

Transit service is not subject to arbitration under Section 252, for the reasons set forth below (and in SBC's discussion of NIM Issue 8). Specifically, transiting is not part of SBC's Section 251/252 obligations, nor is transiting a UNE (as the FCC made clear in paragraph 534 of the *TRO*).[69]

At the outset, an explanation of what is, and is not, at stake here is warranted. Level 3 argues that "a flash cut away from SBC transiting traffic would significantly and negatively impact Level 3's operations and ability to offer services to customers," and thus "[t]he Commission should reject SBC's attempt to withdraw its transiting services." Level 3 Ex. 3 (Gates Direct) at 39, 41. But SBC does not propose any such flash-cut, nor is SBC attempting to withdraw its transiting services. To the contrary, SBC has offered to enter into a voluntary agreement with Level 3 that will contractually obligate SBC to continue to provide transiting at the same rates that currently apply.[70] *See* SBC Ex. 7.0 (McPhee) at 22. Nor is this issue about whether SBC should be "allowed to stop transiting traffic from CLECs." SBC is not asking the Commission to rule that SBC can stop transiting traffic – again, this issue is not about whether transiting will be provided. Rather, the issue here is simply whether section 252 provides a forum for setting terms and conditions for transiting. It does not, because transiting is not subject to arbitration under the 1996 Act.

A. THE 1996 ACT DOES NOT REQUIRE ILECS TO PROVIDE TRANSITING

[69] If the Commission nevertheless concludes that terms and conditions governing transiting should be including in the parties' interconnection agreement, it should adopt SBC's Transit Traffic Appendix and should reject Level 3's proposed transiting provisions for the ITR Appendix, for the reasons explained in the text.

[70] Up to 30 million minutes per month, after which rates begin to increase.

The 1996 Act does not require SBC to furnish a connection between Level 3's network and the networks of third parties. In fact, there is no mention of transiting anywhere in the 1996 Act or the FCC's *Local Competition Order* or rules implementing the requirements of the 1996 Act. And Level 3 itself admits that "[t]here is no FCC rule that requires SBC to transit traffic under Sections 251 and 252." Level 3 Ex. 1.0 (Hunt Direct) at 53. So does Staff. ICC Staff Ex. 1.0 (Zolnierek) at 21-22 ("there is no current FCC rule that requires SBC to provide transiting service under Section 251 of the 96 Act"). And the Commission also has determined that the 1996 Act does not require transiting. 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*, (Nos. 96 AB-003 and -004 Nov. 26, 1996), at 9-11 (holding: "Is transiting required by the Act, the [FCC Local Competition] Order or state law? It is not."); Arbitration Decision, *Sprint Communications L.P. Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Illinois Bell Telephone Company* (No. 96 AB-008), at 11-12).

Level 3 nevertheless argues that transiting is required by the interconnection requirements of sections 251(a)(1) and 251(c)(2) of the Act. SBC disagrees.

Section 251(a)(1) does not contemplate the use of incumbent LECs' networks as bridges between other local networks. Rather, that section requires *all* telecommunications carriers – not just ILECs – to interconnect their facilities and equipment. Section 251(a)(1) provides: "Each telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Thus, if Level 3 wishes to exchange traffic with SBC, the statute imposes a duty to interconnect on Level 3 and SBC. And

if Level 3 wishes to exchange traffic with a third party carrier, the statute imposes a duty to interconnect on Level 3 and the third party carrier. In the latter situation, the 1996 Act requires nothing of SBC.

Level 3 incorrectly asserts that the "indirect interconnection" requirement of section 251(a)(1) requires SBC to transit traffic between Level 3 and another carrier, say "Carrier X." But in that case, SBC is not "indirectly interconnected" with Level 3 *or* Carrier X. Instead, SBC is *directly* interconnected with both. That is, SBC's obligation to indirectly interconnect with other carriers simply does not come into play here. (Nor does SBC's obligation to allow for "direct interconnection" come into play, for in the example provided SBC has satisfied any "direct interconnection" requirement under section 251(a)(1) even if it does not provide transiting.)

If Congress had wanted to make transiting a statutory duty, it could readily have done so. Yet Congress included no such requirement in the 1996 Act. Moreover, even if section 251(a)(i) did require transiting, terms and conditions for transiting would not be subject to arbitration, because the negotiation and arbitration provisions in Section 252 apply only to the duties imposed by 251(b) and 251(c), not 251(a), as explained below.

Furthermore, section 251(c)(2) does not impose any duty to provide transiting. That section, by its plain terms, imposes the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network" Again, this is an obligation on SBC to interconnect *its* network with another carrier's network – not to connect the networks of two other carriers. Section 251(c)(2) simply imposes "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2).

Here, Level 3 is the "requesting telecommunications carrier" requesting interconnection, and thus SBC has "[t]he duty to provide, for the facilities and equipment of [Level 3], interconnection with [SBC's] network." *Id.* That duty is satisfied even if SBC does not provide transiting, which simply has nothing to do with physically interconnecting Level 3's and SBC's networks. And in the *Local Competition Order,* the FCC foreclosed 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. The FCC concluded that "the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic" and does *not* include the transport or termination of traffic. *Local Competition Order,* ¶ 176. That, coupled with the absence of any other provision in the 1996 Act that requires transiting, leads to the inevitable conclusion that transiting is not required by the 1996 Act.

Level 3 also suggests that SBC should be required to continue providing transiting pursuant to interconnection agreements because it has done so in the past. But that is irrelevant, as a matter of law. Again, although SBC has never indicated to Level 3 that it will cease providing transiting, transiting is not a section 251/252 obligation, and therefore transiting should be provided pursuant to a separate agreement. The fact that SBC provided transiting as part of its interconnection agreements in the past provides no legal basis to require SBC to continue to do so today. In this arbitration, because the parties dispute whether transiting terms may be included in the agreement, the Commission is bound to decide the issue in accordance with governing federal law, which may not be the same as the parties' prior voluntary agreement. That is because the 1996 Act allows carriers to enter into voluntary agreements "without regard to the standards set forth in subsections (b) and (c) of section 251" (47 U.S.C. § 252(a)(1)), and

the Act does *not* require state commissions, in reviewing and approving negotiated agreements, to ensure that they satisfy "the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(e)(2).

Finally, because transiting is not required by the 1996 Act, it is not subject to arbitration. Not every disagreement between carriers who are making an interconnection agreement is subject to arbitration under section 252 of the 1996 Act. Rather, 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 if the issue is whether something is a just, reasonable or nondiscriminatory term or condition of any of those things, the issue 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. This includes transiting, which, as explained above, is not required by the 1996 Act.

B. IF THE COMMISSION CONCLUDES THAT TRANSITING SHOULD BE INCLUDED IN THE ICA, IT SHOULD ADOPT SBC'S PROPOSED LANGUAGE AND REJECT LEVEL 3'S

If the Commission nevertheless concludes that terms governing transit traffic should be included in the interconnection agreement, it should adopt SBC's Transit Traffic Service Appendix. SBC's Appendix is far more comprehensive than the transiting language Level 3 proposes for the ITR appendix. SBC's Transit Traffic Service Appendix accurately and completely describes the transiting arrangement and the obligations of each party, including the originating carrier, transiting carrier, and terminating carrier. SBC Ex. 1.0 (Albright Direct) at 65-66. In addition, the transiting appendix proposed by SBC clearly defines the threshold at which Level 3 would be required to establish a separate DEOT for traffic exchange between Level 3 and a third party carrier. *Id.* at 61-62.

Level 3 will likely criticize one aspect of SBC's proposed transiting language: that the price of transiting increases after a certain number of minutes of use in a month – 30 million in Illinois. To begin with, there is no evidence that Level 3 has ever come close to approaching the 30 million minute threshold or that it is reasonably likely Level 3 will do so in the future. Moreover, the 30 million minute threshold serves two important purposes. *First,* the threshold provides an incentive for Level 3 to establish direct connections with other carriers when traffic levels are high – and everyone (even Level 3) agrees that it is appropriate for carriers to stop relying on transiting and establish direct connections when traffic reaches a certain level. *Second,* if Level 3 does not establish direct connections, permitting SBC to increase prices after traffic levels reach the threshold provides SBC with compensation to help cover the high cost of

additional tandems that would be required to transit large volumes of traffic. In fact, SBC's proposed rate increase after 30 million minutes is fully consistent with Level 3's own policy position that carriers should minimize the amount of transit traffic that they directly route through the other's network to a third party – see Level 3 proposed language for section 4.3.1 of the ITR Appendix requiring SBC to use reasonable efforts to minimize the amount of transit traffic it directly routes through the Level 3 network.

Finally, any complaint that the increase in the price of transiting after 30 million minutes of use in a month is not based on actual costs would ignore that the TELRIC rate SBC charges for the first 30 million minutes of use does not reflect SBC's actual costs. It would also ignore that, as a legal matter, SBC does not have to provide transiting at TELRIC rates for the first 30 million minutes of use because transiting service is not a UNE and SBC is not required to provide it under the 1996 Act. Indeed, in the *Virginia Arbitration Order* (¶ 117) (which Level 3 otherwise attempts to rely upon), the FCC's Wireline Competition Bureau *rejected* proposals to require TELRIC rates for transiting, holding that (1) there was no precedent for declaring that an ILEC "has a section 251(c)(2) duty to provide transit service at TELRIC rates"; and (2) even if section 251(a)(1) required transiting (an issue that the Bureau did not reach), it "would not require that service to be priced at TELRIC." Thus, Level 3 is receiving a significant price break for the first 30 million minutes of use.

Level 3's proposed transiting language (set forth in the ITR Appendix) is inadequate and should be rejected for several reasons. First, Level 3's proposed language for section 4.3 (ITR Issue 5) states that Level 3 will be required to establish direct trunks when traffic reaches a DS1 or greater level for three consecutive months. This language would be acceptable but for the fact that Level 3 takes the teeth out of the direct trunking requirement by not specifying a time frame

within which direct trunks must be established. Instead, Level 3 uses vague language requiring it to use "commercially reasonable efforts" to establish direct trunks. This is tantamount to imposing no direct trunking requirement at all and requiring SBC to provide transiting indefinitely. SBC's proposed language, in contrast, requires direct trunks to be established within the reasonable time frame of 60 days. *See* SBC Proposed Transit Traffic Service Appendix at 7.1.

Second, Level 3's proposed language for section 4.3.3 (ITR Issue 8) provides for a transition period that would allow Level 3 to transit traffic through SBC until its direct interconnection arrangements are in place. Similar to the language discussed above, this language would be acceptable, but for the fact that Level 3 once again takes the teeth out of the direct trunking requirement by not specifying a time frame within which direct trunks must be established and, instead, requiring Level 3 to use "reasonable efforts" to enter into agreements with third-party carriers.

Third, Level 3's proposal contains no language stating that Level 3 will not strip, alter, add, delete, or change CPN. Such language is essential (and included in SBC's Transit Traffic Service Appendix) for reasons discussed in ITR Issue 11(a).

Fourth, Level 3's proposed language in section 4.3.4 (ITR Issue 9) requires SBC to track and notify Level 3 when transit traffic reaches more than a DS1 level. Specifically, section 4.3.4 provides: "Once SBC13-State notifies LEVEL 3 that more than a DS1's worth of traffic has been exchanged with a 3rd party carrier for more than three months, LEVEL 3 will use commercially reasonable efforts to establish interconnection arrangements with the 3rd party carriers." In other words, Level 3's obligation to establish direct interconnection arrangements with third party carriers would not kick in until SBC notified Level 3 that Level 3's traffic

exceeded a DS1's worth of traffic for three months. This is a delay tactic. Level 3 does not need SBC to keep track of the traffic it exchanges with third party carriers. SBC should not be required to manage Level 3's network in the manner proposed by Level 3.

Fifth, Level 3's proposed language for section 4.3.1 (ITR Issue 6) relates to the situation where Level 3 is the transit service provider to SBC – not visa versa. Level 3's proposed language requires SBC (once Level 3 establishes a direct trunk arrangement with another carrier) to use reasonable efforts to minimize the amount of transit traffic it directly routes through the Level 3 network to the third party terminating carrier. This language is unacceptable because it is not reciprocal (*i.e.,* Level 3 does not have a corresponding duty to use reasonable efforts to minimize the amount of transit traffic it routes through SBC's network).

Sixth, Level 3's proposed language appears to say nothing about pricing (except with respect to Connecticut). The absence of such language is particularly troubling given Level 3's claim that SBC will fully recover the cost of providing transit service.

* * *

For these reasons, the Commission should find that SBC is not required to provide transit service pursuant to an ICA, and therefore terms relating to such service should not be included in the ICA. However, in the event the Commission concludes that transiting terms and conditions should be included in the ICA, the Commission should adopt SBC's proposed Transit Traffic Service Appendix, which is far more comprehensive than Level 3's proposed transiting language for the ITR Appendix.

ITR ISSUE 11(A): SHOULD SECTION 5.3 ADDRESS ONLY LOCAL INTERCONNECTION TRUNK GROUPS?

ICA Reference: Appendix ITR §§ 5.3, 5.3.1.1, 5.3.2.1

Pursuant to sections 5.3 and 5.4 of the parties' existing interconnection agreement, Level 3 has already established (and has agreed to maintain) two separate trunk groups – local interconnection trunk groups and Meet Point trunk groups.[71] The dispute here is whether Level 3 should be required to provision Feature Group D (FG-D) access trunk groups as well as local trunk groups to every switch where Level 3 has a significant amount of traffic. Level 3 maintains it should not, and seeks to use local interconnection trunk groups – instead of access trunk groups – to carry interexchange traffic which Level 3 exchanges with SBC in its (Level 3's) capacity as an IXC. Stated another way, Level 3 seeks to combine local/IntraLATA toll traffic with interexchange access traffic over the same trunk group – the local interconnection trunk group. As we discussed below, the Commission has rejected proposals essentially identical to Level 3's in two previous arbitrations, including one just last year, and it should reject Level 3's proposal as well.

Level 3's proposal must be rejected for several reasons. *First*, terms and conditions applicable to the exchange of traffic between SBC and Level 3, where Level 3 is acting as an IXC, do not fall within the parameters of section 251 of the 1996 Act. Such terms and conditions therefore are not properly the subject of a section 251/252 interconnection agreement. *Second,*

[71] In section 5.4.1 of the ITR Appendix to the parties' existing interconnection agreement, Level 3 agreed to establish a Meet Point trunk group separate from the local interconnection trunk group: "InterLATA traffic shall be transported between CLEC switch and the SBC-13STATE Access or combined local/Access Tandem over a 'meet point' trunk group separate from local and IntraLATA toll traffic." And in section 5.4.3 of the ITR Appendix to the parties' existing agreement, Level 3 agreed to establish Meet Point trunk groups at every SBC access tandem: "When SBC-13STATE has more than one Access Tandem in a local exchange area of LATA, CLEC shall establish an InterLATA [*i.e.,* meet point] trunk group to each SBC-13STATE Access Tandem where the CLEC has homed its NXX code(s)."

terms and conditions relating to Level 3's relationship with SBC, and its rights and obligations vis-à-vis SBC, when Level 3 is acting in its capacity as an IXC, are governed by federal access tariffs. Those federal access tariffs require interexchange traffic to be carried over access trunks – not local interconnection trunks – and this Commission lacks jurisdiction to alter those federal access tariffs. *Third,* Level 3's proposal seeking to combine local/IntraLATA toll traffic with interexchange access traffic on the same trunk group should be rejected because it would create significant billing problems without any discernable upside. Each of SBC's arguments is discussed separately below.

Notably, there is nothing new about the requirement that interexchange access traffic be delivered on a trunk group that is separate from local/intraLATA toll traffic. This is a well-established principle beginning even before the Commission's decision in Docket No. 96-0404 dated August 4, 1997, where the Commission held it would not be reasonable for Sprint to deliver all its traffic over one trunk group and then ask SBC to bill it based upon percentage factors developed between the parties; and stated:

> "We agree with Ameritech's contention that, if nonjurisdictional trunks were used, neither Ameritech nor any other carrier would be able to isolate or measure the volumes of each type of traffic that terminates over a single trunk group, which in turn would necessitate the use of estimated, percentage factors in lieu of actual measurements to create a bill. Such billing arrangements are not commercially reasonable or cost effective in the present market. We so found in the MCI and Sprint arbitrations, noting that it was not possible to obtain accurate measurements over combined trunk groups . . . ."

The Commission reaffirmed that conclusion last year in the AT&T arbitration. Arbitration Decision, *AT&T Communications of Illinois, Inc., TCG Illinois and TCG Chicago, Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company Pursuant to Section 252(b) of the*

Telecommunications Act of 1996 (ICC Docket No. 03-0239 August 26, 2003) at 151-54. Nothing has changed since that would invalidate that conclusion. And, a hearing examiner recently recommended the same in the Proposed Arbitration Decision in the MCI/SBC Illinois arbitration (at 106-107).

A. TERMS AND CONDITIONS APPLICABLE TO THE EXCHANGE OF TRAFFIC BETWEEN SBC AND LEVEL 3, WHERE LEVEL 3 IS ACTING AS AN IXC, DO NOT FALL WITHIN SECTIONS 251 AND 252, AND THEREFORE ARE NOT PROPERLY PART OF THIS ARBITRATION.

First, the terms and conditions that apply when Level 3 is acting as an interexchange carrier and purchasing access from SBC are not properly part of this arbitration. The sole purpose of this arbitration is to implement the requirements of sections 251 and 252 of the 1996 Act. And the detailed obligations set forth in those sections (including the obligations under section 251(b) that all local exchange carriers have with respect to resale, number portability, dialing parity, access to rights of way, and reciprocal compensation, and the obligations under section 251(c) that apply only to incumbent local exchange carriers, *i.e.*, the duty to negotiate and to provide interconnection, access to UNEs, resale, notice of changes and collocation) do not mention interexchange access. Moreover, the requirements of sections 251 and 252 are limited to obligations that SBC owes to Level 3 when Level 3 is acting as a CLEC, not as an IXC (only a CLEC can demand arbitration, not an interexchange carrier).

Several FCC orders confirm that the local competition provisions of sections 251 and 252 of the Act do not govern terms and conditions of interexchange access service. For example, in paragraph 191 of the *Local Competition Order,* the FCC made clear that the traffic exchanged between SBC and Level 3 where Level 3 is acting as an IXC (*i.e.,* interexchange traffic) is not traffic for which interconnection is required under section 251(c)(2) of the 1996 Act (*i.e.,* "telephone exchange" and "exchange access" traffic). *Local Competition Order,* ¶ 191. And, in

the *ISP Remand Order,* the FCC made clear that the terms and conditions relating to access – specifically, access rates – predate and are entirely separate and distinct from the local competition provisions of sections 251 and 252. *ISP Remand Order,* ¶¶ 34-41 (finding that access traffic is exempted from reciprocal compensation requirements of 251(b)(5)); *id.,* ¶ 37 (stating that "Congress excluded all such access traffic from the purview of section 251(b)(5)); *id.,* 39 ¶ ("unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g). These services thus remain subject to FCC jurisdiction under section 201."); *Local Competition Order,* ¶ 1034 ("We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.").

Since the passage of the 1996 Act, state commissions have rejected carriers' attempts to smuggle into section 251/252 arbitrations terms and conditions related to interstate access. For example, in a 1996 arbitration proceeding involving Ameritech Illinois and Teleport Communications Group, Inc. ("TCG"), TCG sought to include in the interconnection agreement terms and conditions relating to switched access service. The Illinois Commission rejected that proposal stating:

> Contrary to TCG's interpretation, Section 251(c)(2) does not require the incumbent carrier to negotiate for transmission and routing of telephone exchange access. As Ameritech noted, the Act actually provides that incumbent carriers must "provide for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access." The FCC has concluded that the term interconnection under Section 251(c)(2) refers only to the physical linking of two networks and not to the transport and termination of traffic and that therefore, access charges were not affected by its rules implementing section 251(c)(2).

Arbitration Decision, *Teleport Communications Group Inc. Petition for Arbitration pursuant to § 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Illinois Bell Telephone Co. d/b/a Ameritech Illinois*, (ICC Docket No. 96-AB-001 Nov. 4, 1996), at 15. The Commission therefore "conclude[d] that TCG's proposal is beyond the scope of this arbitration proceeding." *Id.*

Furthermore, the Fifth Circuit also has held that the requirements of sections 251 and 252 of the 1996 Act do not apply to interstate access services. In *Texas Office of Public Utility Counsel v. FCC,* 265 F.3d 313, 324 (5th Cir. 2001), the Texas Office of Public Utility Counsel argued that the FCC violated the 1996 Act by failing to conduct a comprehensive, forward-looking cost-study with respect to long-distance access charges. The Fifth Circuit rejected that argument stating: "The 1996 Act does not compel the FCC to conduct forward-looking cost-studies because the cost-study requirements of §§ 251(c)(1) and 252(d)(1) do not apply to the interstate access services at issue in this petition." *Id.*

Because terms and conditions relating to interexchange access do not fall within the parameters of section 251 of the 1996 Act, such terms and conditions should not be included in the ICA.

B. LEVEL 3'S RIGHTS AND OBLIGATIONS AS AN INTEREXCHANGE CARRIER ARE GOVERNED BY FEDERAL ACCESS TARIFFS, WHICH THIS COMMISSION IS WITHOUT POWER TO ALTER

Second, Level 3's rights and obligations as an interexchange carrier are governed by federal access tariffs, not sections 251 and 252 of the 1996 Act, and not by an interconnection agreement. When Level 3 is acting as an interexchange carrier delivering a call to SBC for routing to SBC's local customers, it is purchasing terminating access. And the federal tariff that governs the purchase of interstate access provides that such traffic must be routed over an access trunk – a trunk group that only carries interexchange traffic. Level 3 does not disagree. Level

3's proposed language for ITR Issue 11(a) (and other ITR issues) essentially asks this Commission to change the federal access tariff requirement and permit Level 3 to route interexchange access traffic on the same trunks that carry local traffic. The Commission does not have jurisdiction to arbitrate terms and conditions of access purchased by an interexchange carrier. And even if it did, the Commission still could not change (via an interconnection agreement) terms and conditions found in a federal tariff.

Supporting SBC's position is a Seventh Circuit decision holding that claims are preempted where resolution of the claim would effectively invalidate a federal tariff. In *Cahmann v. Sprint Corp.,* 133 F.3d 484, 486-87 (7th Cir. 1998), plaintiffs brought a class action against Sprint asserting breach of contract and fraud because Sprint (pursuant to an amendment to a federal tariff) reneged on a contract to provide a full year of free Friday calls to anywhere in the world. The Seventh Circuit affirmed the district court's decision granting judgment for Sprint on the pleadings on the ground that the claim was one to invalidate a tariff filed with the FCC and any decision by the court invalidating the tariff would be invading the FCC's jurisdiction. *Id.* at 486. The Seventh Circuit specifically rejected interpretations of savings clauses "that would empower state courts to gut the federal regulatory scheme or would place the carrier under inconsistent obligations." *Id.* at 488. The Seventh Circuit further stated: "Once the plaintiff's claim was properly recharacterized as a challenge to the amended tariff, the doctrine of primary jurisdiction should have been invoked and the plaintiff told to repair to the FCC." *Id.* at 491.

Several circuit court decisions support SBC's position by holding that, under the filed tariff doctrine, claims challenging the reasonableness of an FCC-approved federal tariff are barred, reserving that evaluation of tariffs to the FCC. *Metro East Center for Conditioning and*

Health v. Qwest Communications International, Inc., 294 F.3d 924, 927 (7th Cir. 2002) (under "the filed-rate doctrine (sometimes called the filed-tariff doctrine because it covers terms as well a rates) . . . [i]t is the regulatory agency (here the FCC) that possesses exclusive authority to set aside rates, terms, conditions, and other ingredients of a tariff."); *Evanns v. AT&T Corp*., 229 F.3d 837, 840 (9th Cir. 2000) ("the filed rate doctrine bars all claims – state and federal-that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed") (citation and quotation marks omitted); *Fax Telecommunications Inc. v. AT&T*, 138 F.3d 479, 489 (2d Cir.1998) (noting that "[i]f this court were to enforce the promised rate and award damages on that basis, we would effectively be setting and applying a rate apart from that judged reasonable by the FCC, in violation of the nonjusticiability strand of the filed rate doctrine."); *Hill v. BellSouth Telecommunications, Inc*., 364 F.3d 1308, 1317 (11th Cir. 2004) (explaining that the filed tariff doctrine "prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority").

These principles are equally applicable here, where Level 3 proposes language for various sections of the ITR Appendix that effectively challenges federal access tariffs. Indeed, by proposing language that would permit Level 3 to carry interexchange access traffic over local interconnection trunk groups, Level 3 seeks to invalidate the federal access tariff requirement that Level 3 carry such traffic over access trunks. Any such challenge to the tariff should be brought before the FCC, not before state commissions under the guise of proposed language to an interconnection agreement.

C. LEVEL 3'S PROPOSAL TO COMMINGLE INTEREXCHANGE ACCESS TRAFFIC WITH LOCAL/INTRALATA TOLL TRAFFIC WOULD CREATE SIGNIFICANT BILLING PROBLEMS

Third, SBC's proposal is reasonable because it simply requires that the parties maintain the status quo (*i.e.,* that Level 3 maintain the local interconnection trunk groups and Meet Point

trunk groups it has already established, with local/IntraLATA toll traffic carried on the local interconnection trunk groups and InterLATA traffic to or from Level 3's customers to an IXC carried over the Meet Point trunk groups), and that Level 3 follow the applicable federal tariffs requiring Level 3 to carry interexchange access traffic (*i.e.,* traffic exchange between SBC and Level 3 where Level 3 is acting as an IXC) over access trunks. Level 3, in contrast, seeks to change the parties' current arrangement by advocating language in numerous sections of the ITR Appendix that would permit it to combine local/IntraLATA toll traffic with interexchange "access" traffic on a single trunk group – the local interconnection trunk group. The Commission rejected this proposal when Sprint made it in Docket No. 96 AB-006 (*See* Arbitration Decision at 6-7), and nothing has changed since that decision that warrants a different result here. Dr. Zolnierek said "there is very little in the way of concrete costs and benefits in the record" (Tr. at 626), and that certainly weighs against departing from the Commission's precedent.

Level 3 has not identified any material benefit to changing its current practice of carrying jurisdictionally distinct traffic on separate trunk groups – trunks groups that have already been established. But changing that practice would have a considerable downside. Specifically, permitting Level 3 to carry interexchange access traffic on the same trunk group as local/intraLATA toll traffic would create significant billing problems for SBC. SBC Ex. 1.0 (Albright Direct) at 34-37.

Like all incumbent carriers, SBC charges two different rates for the different types of traffic Level 3 sends to SBC: interexchange "access" traffic is billed at tariffed access rates and "251(b)(5)" traffic is billed at reciprocal compensation rates. SBC Ex. 1.0 (Albright Direct) at 35-36. Software limitations prevent SBC from identifying the traffic it receives over combined

trunks groups. *Id.* at 36. All traffic that is sent over a single trunk group will generate the same type of billing record. *Id*. Thus, if Level 3 were allowed to combine section 251(b)(5) and IntraLATA traffic with interexchange access traffic, it would be very difficult – if not impossible - for SBC to properly assess reciprocal compensation or access charges for the traffic coming over the combined trunk group. *Id.* at 37-38. In contrast, separate trunking for local/intraLATA toll and interexchange access traffic allows accurate tracking and billing of traffic exchanged between the carriers. *Id.* at 36-37. It permits SBC to readily distinguish between interexchange access traffic (which is billed at tariffed access rates) and section 251(b)(5) traffic (which is billed at the lower reciprocal compensation rate). *Id.*

A provision allowing Level 3 to combine traffic would give Level 3 the means to avoid paying the appropriate access charges. SBC Ex. 1.0 (Albright Direct) at 36-38. Indeed, with today's technology, a CLEC can easily change or delete CPN ("calling party number"), a set of digits and related indicators which allows billing systems to determine the jurisdictional nature of calls, to present an access call as a local call and avoid access charges. *Id.* at 38-42. Although separate trunks would not eliminate completely the possibility of this kind of "gaming," they would allow SBC to more effectively monitor for and detect this sort of fraudulent activity. *Id.* at 35-36.

SBC's concern – that allowing carriers to combine interexchange access traffic on the same trunk group as local/IntraLATA toll traffic provides an increased opportunity for a CLEC improperly to deprive SBC of "terminating access" fees due to SBC – is not conjectural. Indeed, this issue has received heightened attention due to recent gaming among carriers in the industry 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. SBC Ex. 1.0 (Albright

Direct) at 37-38. For example, regarding recent allegations that MCI/WorldCom misrouted calls over AT&T's network, AT&T stated:

> We're talking about *the difference between shopping for bargains and shopping with somebody else's credit card.* The latter is clearly a crime that people can go to jail for.[72]
>
> *Debtors (MCI/WorldCom) were well aware that even if AT&T had known to look, AT&T could not have easily detected Debtors' high-cost calls.* Indeed, even after law enforcement notified AT&T of Debtors' fraudulent diversion scheme, *it took AT&T weeks to locate the diversions in the ocean of data that AT&T's network generates*.[73]

Id. at 38. This is not to suggest that Level 3 intends to engage in this practice, but other carriers can opt into this ICA under the MFN provisions of Section 252(i) and therefore the ICA must effectively guard against dangers of this type.

Level 3 offers a vague explanation of the process it would propose for developing factors, but all that vague explanation makes clear is that Level 3 has no idea how the factors would be calculated. Level 3 states that: call data (the telephone number of NPA-NXX of the originating and terminating numbers) would have to be collected and analyzed on all calls to calculate the PIU; the remaining traffic (a combination of local and intrastate toll) would have to be analyzed once again – comparing the call data with call tables to determine the PLU; and then for IP-Enabled traffic, an Originating Line Identifier (OLI) code would have to be attached to the call record to identify calls that originate as IP-enabled traffic.

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[72] AT&T Replies to WorldCom's Bankruptcy Court Response Wednesday August 6, 2003 5:14 pm ET, AT&T Chief Counsel James Cicconi.

[73] AT&T Replies to WorldCom's Bankruptcy Court Response Wednesday August 6, 2003 5:14 pm ET (emphasis added).

But at the same time, Level 3 concedes that it has not developed any method for calculating the PIPU. Wilson Direct at 60 ("Level 3 has not yet developed a specific method of calculating PIPU to identify IP enabled services traffic"). In fact, Level 3 concedes that there is no industry standard for the Originating Line Identifier (OLI) code for IP-enabled traffic – *i.e.,* the code that would have to be attached to the call record to identify calls that originate as IP-enabled traffic. Tr. (Wilson) at 272, 274.

Moreover, even if Level 3 had presented a cogent, easily understood process that reflected recognized, widely-accepted industry standards, there still remains three critical problems. *First,* the process that Level 3 attempts to describe in inherently cumbersome and expensive. *Second,* it would inevitably lead to significantly *under*compensated traffic. Factors are based on what happened in some past period and then applied to the current period to determine the categories to which current traffic should be assigned for billing purposes. And it is equally clear that there will be a mismatch. Level 3 undoubtedly expects that the volume of interstate interexchange traffic that it delivers to SBC will increase dramatically and continuously in the coming months and years. That being the case, any factors that might be developed would always fail to accurately reflect the amount of such traffic in the current period and therefore would always result in billing errors that favor Level 3 and hurt SBC.

Level 3 may respond that the parties could always recalculate after the fact and then "true up" based on the recalculation. But Level 3 has not proposed any language that would accomplish this. And even if it had proposed such language, it would at a minimum create both an administrative headache and a fertile ground for ongoing debate and controversy. Indeed, there is no evidence to support the theory that the PLU, PIU, and PIPU could be easily audited – quite the contrary, constantly analyzing the data would be an administrative nightmare. Given

the number of billing records SBC would have to examine, that process would be time consuming, expensive, and difficult to do on an ongoing basis. What's more, the accuracy of any audit would again depend on data supplied by Level 3 (or any CLEC that opts into the interconnection agreement that will result from this proceeding) – which could be easily manipulated.[74]

The billing problem discussed above is the single largest problem associated with Level 3's proposal to combine interexchange access and local/intraLATA toll traffic onto a local trunk group. SBC Ex. 1.0 (Albright Direct) at 38. This problem has been identified by all the major ILECs and at least one state commission (the Wisconsin Commission) has established an industry-wide committee to investigate how to address the issue. *Id.* Level 3 has presented no evidence that any purported benefit derived from combining jurisdictionally distinct traffic on a single trunk groups outweighs the extra complexity and costs it creates for billing. Nor does Level 3 indicate who will bear the costs of developing any necessary procedures; and Level 3 will likely argue that SBC bear those costs.

Level 3 claims that SBC's proposal for separate trunk groups would cause Level 3 to build "separate networks [that] would be composed of transport facilities and switching facilities and would require duplication of both." Level 3 Ex. 2.0 (Wilson Direct) at 17. This is incorrect. Under SBC's proposal, Level 3 only needs to maintain the trunk groups that it has already

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[74] Even if use of a PLU, PIU, and PIPU could solve the billing problem discussed above, billing is not the only reason why traffic should be routed on separate trunk groups. SBC deploys tandems throughout its network based on specific traffic needs. SBC Ex. 1.0 (Albright Direct) at 38. A Local Only Tandem Switch is planned, designed, and engineered to support only local traffic, which limits its ability to support IXC carried traffic in a number of ways, as explained in the testimony of SBC witness Albright. *Id.* at 39-40. In its rebuttal testimony in a parrallel proceeding between the parties in Indiana, Level 3 has agreed to route only local traffic to Local Only tandems. Level 3 Ex. 10 (Wilson Rebuttal) at 2 ("SBC raises several technical issues regarding the use of so-called "local Only" tandem switches for both local and toll traffic. While there are technical solutions that would allow these switches to handle both types of traffic, Level 3 can agree to direct only local traffic to these switches.").

established (Meet Point Trunk Groups to each SBC Access Tandem and Local Interconnection Trunk Group to each SBC Tandem) and the trunk group it is required to establish pursuant to federal tariff (access trunks). What Level 3 is trying to accomplish – and what SBC is trying to prevent – is the routing of interexchange traffic over the local interconnection trunk groups instead of the access trunks Level 3 is required to use under federal tariff. Any suggestion by Level 3 that SBC's proposal would cause it to establish addition trunk groups or to build additional facilities is a diversion that simply is not true.

Level 3 seems to suggest that, under SBC's proposal, it would be forced to establish more trunks overall, thereby causing it to purchase more facilities to carry those trunks. This is also incorrect. If Level 3 efficiently uses its trunks groups, the number of trunks required (and hence the number of facilities required) will not decrease merely by combining local and interexchange access traffic; conversely, the number of trunks required will not increase merely by requiring local/intraLATA toll and interexchange access traffic to be carried on separate trunk groups. SBC Ex. 1.0 (Albright Direct) at 32-34. For example, if a CLEC fully utilizes 24 trunks to carry its local/intraLATA traffic and 24 additional trunks to carry its interexchange access traffic, it will still require 48 trunks, even if it is permitted to combine all of that traffic over a single trunk group. And Level 3 is *not* efficiently utilizing its trunks. As Mr. Albright testified, Level 3 has an extraordinarily low utilization of its local/intraLATA toll interconnection trunks in Illinois, SBC Ex. 1.1P (Albright Supp) at 8. Level 3 can gain efficiencies – and reduce the number of trunks – merely by more efficiently utilizing its local/IntraLATA trunks, on the one hand, and its interexchange access trunks, on the other. It is not necessary to combine trunk groups to realize efficiencies. Such efficiencies are there for the taking, even while maintaining separate trunk groups for local/intraLATA and interexchange access traffic. *Id.* As Dr. Zolnierek testified (Tr.

at 626-627), Level 3's current low (*i.e.*, inefficient) utilization of its existing trunks is a "factor that will play" into the consideration of this issue.

Level 3 also claims that a single large trunk group is always better than multiple small trunk groups and that it is always preferable to combine as much traffic as possible on a single trunk group (Level 3 Ex. 2.0 (Wilson Direct) at 17). This claim, however, is beside the point because Level 3 already has established separate trunk groups – thus, the ship has sailed on any purported benefit of Level 3 using a single large trunk group. In any event, Level 3's statement is true only to a point. SBC Ex. 1.0 (Albright Direct) at 40-43. The Level 3 switch must interconnect to many SBC switches, and other carriers must also interconnect with SBC switches. *Id.* But there is a finite number of trunk ports in any switching system – a tandem is limited to 100,000 trunks. *Id*. at 41. Under these real-world circumstances, it is more efficient to distribute trunk groups across SBC's many switches. *Id*. Otherwise, any one CLEC could exhaust a tandem with one interconnection and prevent other carriers from interconnecting at the tandem. *Id.* at 41-42.

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For these reasons, Level 3's proposed language in various sections of the ITR Appendix that interjects terms and conditions governing its operations as an IXC should be rejected.

ITR ISSUE 11(B): SHOULD INTERLATA TOLL TRAFFIC BE ROUTED OVER SEPARATE TRUNK GROUPS FROM SECTION 251(b)(5)/INTRALATA TRAFFIC WHEN THERE IS A SINGLE ACCESS TANDEM IN CA, NV AND MIDWEST STATES?

ICA Reference: ITR Appendix §§ 5.3, 5.3.1.1, 5.3.2.1

ITR Issue 11(b) is similar to ITR Issue 11(a), and Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein.

ITR ISSUE 12(A): SHOULD DIRECT END OFFICE TRUNKS TERMINATE ONLY SECTION 251(b)(5)/ INTRALATA TRAFFIC?

ICA Reference: Appendix ITR § 5.3.3.1

The disputed language on ITR Issue 12(b) (with SBC's in bold italic and Level 3's in bold underline) is:

> The parties shall establish direct End Office primary high usage Local Interconnection ***Trunk Groups*** for the exchange of ***Section 251(b)(5)/IntraLATA*** **Telecommunications** traffic where actual or projected traffic demand exceeds one DS1's worth of traffic for three (3) consecutive months as measured during the busy hour.[75]

Level 3, through its use of the term "telecommunications traffic," again seeks authorization to carry interexchange access traffic over local interconnection trunk groups. Accordingly, this issue is related to ITR Issue 11(a) above and Level 3's proposed language should be rejected for the reasons discussed therein.

To the extent Level 3's proposed language is designed to permit it to route interexchange access traffic over Direct End Office Trunk Group (DEOTs), there are additional technical reasons why that proposal should be rejected. A DEOT is a direct trunk group between two end office switches. SBC Ex. 1.0 (Albright Direct) at 48. DEOTs are established between two end offices to alleviate tandem exhaust.[76] *Id.* at 47. More specifically, routing calls directly from one end office switch to the other end office switch by way of a DEOT eliminates the need to route through the serving tandem, thereby conserving tandem resources. *Id.* at 48.

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[75] As noted in the discussion of ITR Issue 12(b), SBC has agreed to Level 3's proposed language at the end of section 5.3.3.1 stating "for three (3) consecutive months as measured during the busy hour."

[76] Typically, a DEOT is established between two SBC end office switches when the amount of traffic, or call volume, between the two offices reaches an offered load level that is equivalent to 24 trunks during a 20-day Average Busy Hour at the tandem. SBC Ex. 1.0 (Albright Direct) at 48.

DEOTs carry only section 251(b)(5) traffic originated by the customers connected to one end office switch, destined for the customers connected to the other end office switch. SBC Ex. 1.0 (Albright Direct) at 46-47. SBC engineers each of its end office switches to handle the traffic and switching requirements needed to provide service to only the customers that are connected to each particular office. SBC Ex. 1.0 (Albright Direct) at 47-48. If the DEOT routes calls destined for customers that are in an office other than the office at the terminating end of a direct trunk, the end office would be forced to function like a tandem. *Id*. SBC, however, purchases, administers, and maintains end office switches to function only as end office switches – not as tandem switches. *Id*. at 47. End office switches are not designed to perform a tandem function and tandem switches perform functions that cannot be performed by an end office switch. *Id*. at 47-48. If end office switches were required to act as a tandem switch, network resources for that switch would be used at a faster-than-planned rate, thereby causing SBC to purchase more resources than would otherwise be required and reducing the level of service provided to customers. *Id*.

For these reasons, Level's 3's proposed language should be rejected and SBC's proposed language adopted.

ITR ISSUE 12(B): SHOULD LEVEL 3'S OBLIGATION TO ESTABLISH DIRECT END OFFICE TRUNK GROUPS IF TRAFFIC DEMAND EXCEEDS A CERTAIN LEVEL BE CONDITIONED ON DEMAND EXCEEDING THAT LEVEL FOR THREE CONSECUTIVE MONTHS?

ICA Reference: Appendix ITR § 5.3.3.1

This issue has been resolved by the parties.

ITR ISSUE 13: **SHOULD MEET POINT TRUNK GROUPS BE ESTABLISHED FOR THE TRANSMISSION AND ROUTING OF IXC INTRALATA OR INTERLATA ACCESS TRAFFIC?**

ICA Reference: Appendix ITR § 5.4.1

The dispute in ITR Issue 13 is over the following language (with SBC's proposed language in bold italic, and Level 3's proposed language in bold underline):

> Meet Point Trunk Groups ***will*** **<u>may</u>** be established for the transmission and routing of traffic between [Level 3's] ***End Users*** and **<u>Circuit Switched</u>** interexchange carriers via [SBC] Access or Local/Access Tandem Switches. ***This traffic is separate from Section 251(b)(5)/IntraLATA Traffic***. **<u>Circuit Switched Telephone Toll</u>** sent to or received from interstate interexchange carriers shall be transported between [Level 3 and the SBC] Access Tandem Switch over a Meet Point Trunk Group.

Level 3 already has established Meet Point trunk groups to each access tandem where it has customers pursuant to section 5.4 of the ITR Appendix to the parties' current interconnection agreement. This should resolve the dispute over whether the term "will" or "may" should be used in section 5.4.1 – SBC's proposed language "will" should be adopted. It also should eliminate Level 3's opposition to SBC's proposed language: "This traffic is separate from Section 251(b)(5)/IntraLATA Traffic."

Further, if Level 3, by proposing the phrase "circuit switched telephone toll," seeks to be permitted to deliver some unspecified forms of Meet Point interexchange access traffic carried over local interconnection trunk groups, that proposal must be rejected. Meet Point traffic (whatever its form) – *i.e.,* traffic exchanged between Level 3 customers and IXCs – does not belong on trunks dedicated to the exchange of traffic between Level 3 customers and SBC customers.

First, Meet Point traffic is outside the scope of sections 251 and 252 of the Act: the statute governs only traffic exchanged between SBC and Level 3 in their capacities as local

exchange carriers. Meet Point traffic, however, is exchanged between Level 3 and third party IXCs; SBC is a mere intermediary – solely because both Level 3 and the IXCs are interconnected at its tandem; and that is a role that is not governed by sections 251 and 252. Accordingly, it would be inappropriate for the Commission in this proceeding to impose on SBC a contract term that requires it to permit Level 3 to intermingle third party Meet Point traffic with 251/252 traffic on the same trunks. Even if that were not the case, Level 3 has not proposed any means of tracking the traffic to determine how much is Level 3-SBC traffic and how much is IXC-bound Meet Point traffic subject to the access charge regime.

For these reasons, Level 3's proposed language for ITR Issue 11(a) should be rejected and SBC's adopted.

ITR ISSUE 14(A): SHOULD LEVEL 3 BE REQUIRED TO ESTABLISH A MEET POINT TRUNK GROUP TO EACH SBC 13-STATE LOCAL/ACCESS OR ACCESS TANDEM SWITCH WHERE LEVEL 3 HAS HOMED ITS NXX CODES?

ICA Reference: Appendix ITR §§ 5.4.3, 5.4.4, 5.4.6

ITR Issue 14 is similar to ITR Issue 13, and Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein.

ITR ISSUE 14(B): SHOULD THE PARTIES DEVELOP AN AGREED PLAN TO ESTABLISH ADDITIONAL MEET POINT TRUNK GROUPS TO EACH SBC-13STATE WHEN SBC HAS A CONSTRAINED TANDEM?

ICA Reference: Appendix ITR §§ 5.4.3, 5.4.4, 5.4.6

ITR Issue 14 is similar to ITR Issue 13 above and Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein.

ITR ISSUE 14(C): SHOULD EACH PARTY BE REQUIRED TO BEAR THE COST OF TRANSPORTING FX TRAFFIC FOR ITS END USERS?

ICA Reference: Appendix ITR §§ 5.4.3, 5.4.4, 5.4.6

Foreign Exchange (or "FX") calls are dialed as local calls but are really toll calls because they are directed to a party outside the local calling area. SBC Ex. 1.0 (Albright Direct) at 52. The typical FX customer is a business wanting to expand its customer base by making it easy for customers to call the business locally, even if the business is located in another exchange. *Id*. Similar to FX, Virtual NXX (VNXX) is where an NXX is opened for a rate center in which the customer has no physical location within the geographical area of the rate center. *Id.* at 53. VNXX is typically used in order to offer ISP service to a community remotely. *Id*. Specifically, the ISP provider opens a NXX code in an exchange without any equipment or physical presence within the community of interest. *Id.* Customers within the exchange can then call the ISP and the call will be rated as a local call – even though, geographically, it is not. *Id.* at 53-54.. Issue 14(c) is whether each party should be required to bear the cost of transporting FX (or, in Level 3's case, VNXX) traffic.

Level 3, through its proposed language for ITR Issue 14(c), would require that SBC provide free transport from the customer within the exchange to the tandem serving the VNXX customer in another exchange. Level 3 also proposes that calls to its VNXX customer be subject to reciprocal compensation. Given that all calls would move in one direction – from the SBC customer within the exchange to the VNXX customer outside the exchange – only SBC would pay reciprocal compensation. (And, of course, SBC would not and cannot charge its customers for those calls because they are rated as local.)

Reciprocal compensation is not appropriate for this traffic because the calls at issue here are not geographically local. SBC Ex. 1.0 (Albright Direct) at 53. The ISP provider opens an

NXX code in an exchange so that calls from customers within the exchange will be rated as local; but the call is anything but local because the ISP has no physical presence in the exchange. *Id.* at 53-54. The call scenario is like a long distance call. *Id.* at 54.

This issue is addressed fully in IC Issues 3 and 11, and Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein.

ITR ISSUE 15(A): SHOULD TRAFFIC TO AND FROM IXCS BE CALLED "TELECOMMUNICATIONS TRAFFIC" OR "SWITCHED ACCESS CUSTOMER TRAFFIC"?

ICA Reference: Appendix ITR § 5.4.7

ITR Issue 15(a) is similar to ITR Issue 13 above, and Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein.

ITR ISSUE 15(B): SHOULD SBC BE REQUIRED TO DOUBLE TANDEM SWITCH CALLS TO/FROM SWITCHED ACCESS CUSTOMERS?

ICA Reference: Appendix ITR § 5.4.7

Level 3's proposed language for ITR Issue 15(b) would require SBC to double tandem calls for Level 3 that are destined for an IXC. SBC Ex. 1.0 (Albright Direct) at 32-33. This issue is similar to ITR Issue 11(a), and Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein. Moreover, as a technical matter, it is not possible to double tandem calls in the manner proposed by Level 3. *Id.* at 56. Originating switched access traffic has a unique call format referred to as Equal Access. *Id*. The Equal Access formatted call must be sent directly to an IXC Class 3 or higher tandem switch in order for the call to complete. *Id*. Class 4 tandems are not capable of receiving Equal Access formatted calls from another Class 4 tandem, nor can a call sent from an End Office to a Class 4 tandem switch be forwarded to another Class 4 tandem switch. *Id*.

ITR ISSUE 16(A): SHOULD ALL LEVEL 3 ORIGINATING 800 (8YY) TRAFFIC OR SOME LEVEL 3 ORIGINATING 800/8YY BE ROUTED OVER THE MEET POINT TRUNK GROUP?

ICA Reference: Appendix ITR § 5.5.1

ITR Issue 16(a) is whether 800/8YY traffic subject to switched access charges should be routed over local interconnection trunk groups. It should not. This issue is similar to ITR Issue 11(a) above and Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein.

ITR ISSUE 16(B): SHOULD LEVEL 3 BE PERMITTED TO CHOOSE THE TRUNK GROUP TYPE OVER WHICH IT WILL ROUTE TRAFFIC?

ICA Reference: Appendix ITR § 5.5.3

Issue 16(b) is whether Level 3 should be permitted to choose the trunk group type over which it will route traffic. It should not. This issue is similar to ITR Issue 11(a) above and Level 3's proposed language should be rejected and SBC's adopted for the reasons stated therein.

ITR ISSUE 16(C): WOULD SBC EVER DELIVER A POST-QUERIED 800/8YY CALL TO LEVEL 3 FOR COMPLETION?

ICA Reference: Appendix ITR § 5.5.4

ITR Issue 16(c) is framed: "Would SBC ever deliver a post-queried 800/8YY call to Level 3 for completion?" 800/8YY numbers are pseudo numbers that are only assigned in a database and that correlate with the actual 10-digit telephone number. SBC Ex. 1.0 (Albright Direct) at 57. The purpose of 800/8YY queries is to search a database to find the true number being called. *Id*. Each time an 800/8YY number is called, a database query is launched by the switch to determine where to route the call. *Id*. In order to perform a 800/8YY query, Service Switching Point ("SSP") software must be loaded into each switch that is to perform that

function. *Id*. Because the SSP software has been purchased and implemented throughout SBC's entire network, SBC would never need to pay another carrier to perform this function. *Id*. Accordingly, Level 3's proposed language – providing that, in the event Level 3 delivers a post-queried 800/8YY call for SBC, the exchange of such traffic should be mutually handled – is unnecessary.

ITR ISSUE 18: **SBC ISSUE (A): WHAT IS THE PROPER ROUTING, TREATMENT AND COMPENSATION FOR SWITCHED ACCESS TRAFFIC INCLUDING, WITHOUT LIMITATION, PSTN-IP-PSTN TRAFFIC AND IP-PSTN TRAFFIC?**

SBC ISSUE (B): SHOULD THE AGREEMENT SPECIFY PROCEDURES FOR HANDLING INTEREXCHANGE CIRCUIT-SWITCHED TRAFFIC THAT IS DELIVERED OVER LOCAL INTERCONNECTION TRUNK GROUPS SO THAT THE TERMINATING PARTY MAY RECEIVE PROPER COMPENSATION?

ICA Reference: Appendix ITR § 12

Issue ITR 18 concerns the proper routing treatment and compensation for PSTN-IP-PSTN and IP-PSTN traffic.[77] SBC's proposed language at section 12.1 would treat such traffic as switched access traffic subject to the applicable intrastate and interstate access charges. SBC's proposal is reasonable and should be adopted because it preserves the access charge regime under Section 251(g) of the Act and comports with the FCC's existing rules and precedent regarding intercarrier compensation for calls terminating to the PSTN.

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[77] SBC witness Mike Kirksey explained that "PSTN-IP-PSTN" (also known as "IP-in the middle traffic") is traffic that originates over a local exchange carrier's circuit-switched network and is delivered to an interexchange carrier that converts the traffic to IP format for transport across its network, and then delivers the traffic for termination over a local exchange carrier's circuit-switched network. SBC Ex. 6.0 (Kirksey Direct) at 5. "IP-PSTN Traffic" is traffic that originates from the end-user's premises in IP format, is transmitted in IP format to the switch of the service provider, which is then converted to circuit-switched format for delivery to the local exchange carrier on the PSTN for termination over that carrier's circuit-switched network. *Id.* at 5-6.

ITR Issue 18(a) – Compensation for PSTN-IP-PSTN and IP-PSTN Traffic. Level 3 asserts that "IP-enabled Services Traffic," which includes PSTN-IP-PSTN traffic, is exempt from access charges and should be subject to reciprocal compensation under Section 251(b)(5) of the Act. This argument should be rejected on several grounds. *First*, the FCC has conclusively resolved this debate, leaving no question as to the application of switched access charges to PSTN-IP-PSTN traffic. In particular, (and as explained above in the discussion of SBC's position on IC Issue 2) the FCC concluded in its *Access Avoidance Order*[78] that PSTN-IP-PSTN services are telecommunications services, and that access charges are applicable to "calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN." The FCC's conclusion in this respect makes perfect sense, because if such traffic was 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," which would in turn inappropriately "create artificial incentives for carriers to convert to IP networks" in order to avoid paying access charges. *Id.* ¶ 18. Accordingly, Level 3's position that access charges should not apply to PSTN-IP-PSTN traffic should be rejected.[79]

Second, under existing FCC precedent and rules, providers of IP-PSTN services must, unless specifically exempted from doing so, pay interstate and intrastate access charges when

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[78] Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are Exempt from Access Charges*, WC Docket No. 02-361, ¶¶ 12, 19, rel. Apr. 21, 2004 (FCC 04-97) ("Access Avoidance Order").

[79] Level 3's position that access charges do not apply to PSTN-IP-PSTN traffic is also internally inconsistent. For example, although Level 3 asserts "IP-Enabled Services Traffic," which could be interpreted to include PSTN-IP-PSTN traffic, is exempt from access charges (a position that is directly contrary to the *Access Avoidance Order*, Level 3 proposes defining "Circuit Switched IntraLATA Toll Traffic," which would be subject to access charges, in such a way that appears to include PSTN-IP-PSTN traffic. This inconsistency demonstrates that Level 3's overbroad definition of IP-Enabled Services Traffic is inappropriate and would lead to unnecessary confusion.

they send traffic to the PSTN. Although these rules are currently under consideration in the FCC's *IP-Enabled Services NPRM*, the Commission should preserve the regulatory *status quo* by adopting SBC's position pending the outcome of that proceeding. In particular, under SBC's proposal, SBC would be compensated for terminating IP-PSTN traffic at the applicable "jurisdictionalized" access rate (interstate or intrastate) for such traffic in accordance with SBC Illinois' existing switched access tariffs. Mr. Kirksey explained that to effectuate such compensation for IP-PSTN traffic (which may be geographically indeterminate on the IP side of a call), SBC would apply the provisions in its existing tariffs that contain various methods to deal with the lack of geographically accurate endpoint information, such as the use of calling party number ("CPN") information together with other data. Thus, for example, to the extent the CPN associated with a particular IP-PSTN call identifies the call as an intrastate interexchange call, intrastate access charges would apply, unless and until the FCC rules otherwise in its pending *IP-Enabled Services NPRM*. SBC Ex. 6.0 (Kirksey Direct) at 11-12.

In addition, Staff witness Dr. Zolnierek correctly recognized that most, if not all, of the IP-enabled traffic rating and routing issues at the root of the parties' disputes in this proceeding will be resolved in connection with Level 3's own Petition for Forbearance currently pending before the FCC. Staff Ex. 1.0 (Zolnierek) at 6-7. Dr. Zolnierek also pointed out that Level 3's position on IP-enabled services in this proceeding is contradictory in any event because while Level 3 asserts that the FCC has "'determined that IP-enabled Services are interstate in nature and has preempted state jurisdiction over such services,'" it nevertheless asks this Commission to "make determinations regarding rates, terms, and conditions for the exchange of IP-enabled traffic between it and SBC." *Id.* at 8-9. But Level 3 cannot have its cake and eat it too. In short, the Commission should preserve the regulatory *status quo* pending the outcomes of the

proceedings currently before the FCC that address the exact same IP-enabled service issues that Level 3 raises here. Indeed, SBC Illinois witness Kirksey explained that changing the current compensation scheme for IP-PSTN traffic would require both parties to make costly modifications to ordering and billing systems, and it makes absolutely no sense to require the parties to expend the time and expense to implement such measures when they may be only temporary. SBC Illinois Ex. 6.1 (Kirksey Supp.) at 6.

Third, the Commission should reject Level 3's assertion that IP-Enabled Services are properly classified as interstate *information* services to which access charges do not apply. As explained above, under the current FCC rules and precedent, carriers providing PSTN-IP-PSTN and IP-PSTN services are required to pay access charges for calls terminated to the PSTN. Moreover, Level 3's contention that the FCC's Enhanced Service Provider ("ESP") exemption applies to IP-PSTN traffic, and thus, access charges do not apply, is also wrong, because the ESP exemption only allows for an exemption from access charges where access services are used to provide the link between the ISP and its *own* subscribers.[80] The ESP exemption has never been extended to a situation where an ISP uses the PSTN to send traffic to non-customer third parties to whom it is not providing service. Therefore, the use of the PSTN by ISPs involving interexchange traffic (*e.g.*, sending traffic to a LEC's telecommunications service customer on the PSTN) is subject to appropriate access charges, and not reciprocal compensation as Level 3 contends.

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[80] As noted in the discussion of SBC's position on IC Issue 2, 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." *MTS/WATS Market Structure Order*, ¶ 78. And, 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 (emphasis added).

Fourth, Level 3 is mistaken in its reliance on the D.C. Circuit Court of Appeal's decision in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), in support of its position that reciprocal compensation under Section 251(b)(5) of the Act applies to the exchange of IP-Enabled Services Traffic between SBC and Level 3. In *WorldCom*, the court held that section 251(g) did not exempt ISP-bound traffic from Section 251(b)(5) because it found that there were no rules governing intercarrier compensation for that type of traffic prior to the 1996 Act. Level 3 attempts to extend this logic to the instant dispute by arguing that access charges do not and cannot apply because there was no pre-1996 Act rule governing intercarrier compensation for IP Enabled Service Traffic exchanged between LECs. Level 3 is wrong. In fact, rules concerning the payment of access charges for PSTN-originated or PSTN-terminated interexchange traffic were in place long before the enactment of the 1996 Act. *See* 47 C.F.R. § 69.5(b). Therefore, contrary to Level 3's claims, the FCC's existing rule is that access charges apply to IP-PSTN, and that rule should govern unless and until the FCC decides to change that rule in the future.

Additionally, Level 3's alleged parade of horribles that would result from the Commission's adoption of SBC's proposal is baseless. For example, Level 3 asserts that SBC's proposal would, among other things, unnecessarily burden development and deployment of new services, adversely impact economic growth and jobs, and skew emerging local competition from IP-Enabled Service Providers. But even under the current regulatory regime – which SBC's position seeks to preserve – Level 3 touts itself as "one of *the largest* providers of wholesale dial-up services to ISPs in North America and [] *the primary* provider of Internet connectivity for *millions* of broadband subscribers." Level 3 Ex. 1.0 (Hunt Direct), at 5 (emphasis added). Therefore, given Level 3's self-proclaimed success, it is evident that Level 3's position amounts to nothing more than a thinly-veiled attempt to acquire an additional

competitive advantage by exempting itself from access charges for calls terminated to the PSTN, *while all other carriers would be required to continue paying such charges*.

ITR Issue 18(b) – Routing of Interexchange PSTN-IP-PSTN and IP-PSTN Traffic. SBC's proposed language at section 12.1 reflects its position that all switched access traffic, including interexchange PSTN-IP-PSTN and IP-PSTN traffic, is properly routed over access trunks. Level 3 should not be allowed to avoid tariffed switched access charges by routing such interexchange traffic over local interconnection trunk groups, which are not intended for access traffic and do not permit SBC to bill access charges to Level 3. SBC nevertheless acknowledges that some switched access traffic may be improperly delivered by third parties to SBC or Level 3 over local interconnection trunk groups. In those circumstances, SBC should be able in turn to deliver such traffic to the terminating party over local interconnection trunk groups. But, if the delivering party is notified by SBC that such interexchange traffic is being improperly routed over local interconnection trunk groups, both parties should be required to cooperate to remove such traffic from those trunk groups so that they may secure the proper terminating access charges associated with switched access traffic.

Level 3 erroneously asserts that SBC's position would unreasonably require it to establish separate trunk groups to carry interLATA toll and IP-Enabled Services Traffic. As SBC witness Kirksey explained, separate trunk groups for PSTN-IP-PSTN or IP-PSTN traffic would not be necessary to the extent that Level 3 already has separate trunk groups for both access and local traffic. SBC Ex. 6.0 (Kirksey Direct) at 17. SBC is simply asking that Level 3's existing interexchange PSTN-IP-PSTN and IP-PSTN traffic ride the same trunk groups as its other access traffic so that SBC can properly bill for such traffic. Moreover, Level 3 can terminate its "local"

IP-PSTN traffic over its existing local interconnection trunks, pending the FCC's final order in the *IP-Enabled Services NPRM*.

ITR ISSUE 19: **SHOULD THIS APPENDIX INCLUDE A PROVISION THAT STATES THAT PARTIES AGREE TO SUCH PROVISIONS GOVERNING "IP ENABLED SERVICES" AS MAY APPEAR ELSEWHERE IN THE APPENDIX?**

ICA Reference: Appendix ITR § 13

Issue ITR 19 is inextricably intertwined with Issue ITR 18, and concerns Level 3's proposed language at section 13.1, which provides that "The Parties agree to the definition, terms conditions, and use of IP Enabled Services Traffic according to Sections 3.2 and 17 of Appendix IC to this Agreement." SBC opposes Level 3's proposed language at section 3.2 of Appendix IC for the reasons explained above.[81] Because Level 3's proposed language at section 3.2 is inappropriate, the Commission should also reject Level 3's proposed language at ITR section 13.

F. NETWORK INTERCONNECTION METHODS

NIM ISSUE 1: **SHOULD THE INTERCONNECTION AGREEMENT (ICA) GOVERN THE TERMS AND CONDITIONS FOR THE INTERCONNECTION ARCHITECTURE BETWEEN THE PARTIES' NETWORK FOR ALL TRAFFIC?**

ICA Reference: Appendix NIM § 1.1

The dispute over NIM Issue 1 is whether SBC's proposed language (in bold, italic) should be included in section 1.1 of the NIM (Network Interconnection Methods) Appendix:

> This Appendix describes the physical architecture for Interconnection of the Parties' facilities and equipment for the transmission and routing of Telephone Exchange Service traffic and Exchange access traffic between the respective Customers of the Parties pursuant to Section 251(c)(2) of the Act; provided, however, Interconnection may not be used solely for the purposes

[81] Section 17 of Appendix IC has been reserved for future use.

> not permitted under the act, ***including but not limited to solely for the purpose of originating a Party's own interexchange traffic.***

Section 251(c)(2) of the 1996 Act states that incumbent LECs have a duty to interconnect with telecommunications providers "for the transmission and routing of telephone exchange service and exchange access." In interpreting that section, the FCC stated in paragraph 191 of the *Local Competition Order*:

> A telecommunications carrier seeking interconnection only for interexchange services is not within the scope of [section 251(c)(2)] because it is not seeking interconnection for the purpose of providing telephone exchange service. Nor does a carrier seeking interconnection of interstate traffic only – for the purpose of providing interstate services only – fall within the scope of the phrase "exchange access." Such a would-be interconnector is not "offering" access to telephone exchange services. As we stated in the NPRM, an IXC that seeks to interconnect solely for the purpose of originating or terminating its own interexchange traffic is not offering access, but rather is only obtaining access for its own traffic. Thus, we disagree with CompTel's position that IXCs are offering exchange access when they offer to provide exchange access as a part of long distance service.

The FCC therefore concluded that "an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2)."

SBC's proposed language should be adopted because, consistent with paragraph 191 of the *Local Competition Order*, that language makes clear that Level 3 cannot use the interconnection facilities and equipment solely for the purpose of originating or terminating its interexchange traffic.

NIM ISSUE 2: **SHOULD LEVEL 3 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 LOCAL CALLING AREA?**

ICA Reference: Appendix NIM §§ 2.1, 2.1.1-2.1.10

The parties have resolved this issue.

NIM ISSUE 3: **DOES A POI SERVE AS A FINANCIAL DEMARCATION POINT BETWEEN THE PARTIES IN ALL INSTANCES, INCLUDING THOSE WHERE THE CLEC CHOOSES AN EXPENSIVE FORM OF INTERCONNECTION?**

ICA Reference: Appendix NIM § 2.2

The parties have resolved this issue.

NIM ISSUE 4: **DOES THE POI ESTABLISH THE LEGAL, TECHNICAL, AND FINANCIAL DEMARCATION POINT BETWEEN THE PARTIES IN ALL INSTANCES, INCLUDING THOSE WHERE LEVEL 3 CHOOSES TO INTERCONNECT IN A MANNER THAT SBC CONTENDS, AND LEVEL 3 DENIES, IS AN EXPENSIVE FORM OF INTERCONNECTION?**

ICA Reference: Appendix NIM § 2.3

The parties have resolved this issue.

NIM ISSUE 5: **SHOULD THE INTERCONNECTION AGREEMENT GOVERN THE NETWORK ARCHITECTURE AND EXCHANGE OF ALL TRAFFIC BETWEEN THE PARTIES, OR JUST LOCAL TRAFFIC?**

ICA Reference: Appendix NIM § 2.5

The disputed language for NIM Issue 5, with SBC's proposed language in bold italic and Level 3's proposed language in bold underline, is:

> Each Party is responsible for the appropriate sizing, operation, and maintenance of the transport facility to the POI(s). The parties agree to provide sufficient facilities for the ***Local Interconnection Trunk Groups*** **<u>trunk groups</u>** required for the exchange of traffic between [Level 3 and SBC].

Level 3's proposed language, by using the broad term "trunk groups," instead of "local interconnection trunk groups," could be interpreted as requiring SBC to be financially responsible for facilities that carry all types of trunk groups – including, for example, OS-DA, BLVI, 911, mass calling, and Meet Point trunk groups. However, in section 2.7 of the NIM Appendix to the interconnection agreement (the language of which is set forth below in the discussion of NIM Issue 6), the parties already have agreed that Level 3 (not SBC) is financially responsible for facilities over which the OS-DA, BLVI, and 911 trunk groups that carry Level 3-originated traffic ride. Also, to the extent Level 3's proposed language is intended to require SBC to be responsible for facilities that carry mass calling trunks for mass calls originated by Level 3 customers and Meet Point trunk groups that carry interLATA traffic originated by or terminated to Level 3 customers to and from interexchange carriers ("IXC's"), that language should be rejected for the reasons discussed by SBC in NIM Issue 6.

NIM ISSUE 6: **SHOULD LEVEL 3 BE RESPONSIBLE FOR FACILITIES THAT CARRY OS/DA, 911, MASS CALLING AND MEET-POINT TRUNK GROUPS?**

ICA Reference: Appendix NIM § 2.7

The dispute on NIM Issue 6 concerns the following language (in bold underline) proposed by Level 3:

> Level 3 is financially responsible for the facilities that carry OS-DA, BLVI, 911, mass calling and Meet Point trunk groups, which trunk groups are described and defined in Appendix ITR, **<u>however, for the facilities that carry mass calling and Meet-Point trunk groups, the Parties shall be responsible in accordance with their obligations to bring traffic to the single POI.</u>**

The dispute here is not over trunks – pursuant to sections 5.7 and 5.4 of the ITR Appendix to the parties' current interconnection agreement, Level 3 already has established mass calling[82] and Meet-Point[83] trunk groups to SBC's access tandems.[84] Rather, the dispute here is over who is financially responsible for the facilities that carry mass calling and Meet Point trunk groups. Level 3 proposes language for section 2.7 stating that for facilities carrying mass calling and Meet-Point trunk groups, SBC is responsible for the facilities from SBC's switch to the POI and Level 3 is responsible for facilities from Level 3's switch to the POI. Level 3's apparent intent with its proposed language is to make SBC financially responsible for the facilities that carry Level 3's mass calling and Meet-Point trunk groups from Level 3's switch to the access tandem in instances where Level 3 has not established a POI at the SBC tandem.

This, however, is a non-issue. Level 3 has already established a POI at each SBC tandem where it has established phone numbers. Under section 4.1 of the Third Amendment to Interconnection Agreement, Level 3 agreed to establish a POI at each tandem where it has customers. ("Level 3 will establish a physical point of interconnection (POI) in each mandatory local calling area in which it has assigned telephone numbers (NPA/NXXs) in the Local Exchange Routing Guide (LERG)"). SBC Ex. 1.1P (Albright Supp) Attachment A. Because

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[82] Section 5.7.1 of ITR Appendix to the parties' current interconnection agreement required Level 3 to establish Mass Calling trunk groups to SBC's tandems: "A dedicated trunk group shall be required to the designated Public Response HVCI/Mass Calling Network Access Tandem in each serving area. This trunk group shall be one-way outgoing only."

[83] Level 3 has already established Meet Point trunk groups to SBC's access tandems pursuant to section 5.4 of the ITR Appendix to Level 3's current interconnection agreement with SBC.

[84] Level 3 has explained in sworn testimony that it is amenable to establishing mass calling trunk groups, because it recognizes that such trunks serve an important purpose and because in the coming months and years Level 3 expects to attract increasing numbers of customers who are likely to make such calls. Cal. Tr. at 224-229. In the California arbitration proceeding, Level 3 witness Roger DuCloo stated: "We are not opposed to establishing these [mass calling] trunks…." Cal. Tr. at 229.

Level 3 has established a POI at each tandem where it has customers, Level 3 will always be financially responsible for the facilities that carry mass calling and Meet Point trunk groups from Level 3's switch to each tandem. Its proposed language therefore serves no purpose.

Level 3 agrees that this issue is much ado about nothing. In the California arbitration proceeding, Level 3 witness DuCloo was asked: "[I]f you're going to establish a point of interconnection at every tandem, then you'll have a point of interconnection at our high volume calling and mass calling tandem; correct?" Mr. DuCloo responded: "It may not be much of an issue then." Cal. Tr. at 230.

Even if this were a meaningful issue, Level 3 should be financially responsible for the facilities that carry mass calling and Meet Point trunk groups from Level 3's switch to the tandem. For many types of traffic that benefit only Level 3 and its customers, Level 3 appropriately agreed that it is financially responsible for facilities and trunks from its switch all the way to the tandem. For example, in the first part of section 2.7 of the NIM Appendix, Level 3 has agreed to language that makes Level 3 responsible for facilities that carry OS-DA, BLVI, and 911 trunk groups dedicated to *its* traffic. Mass Calling and Meet Point trunk groups are no different from the other types of trunk groups and associated facilities for which Level 3 concedes it is – and should be – financially responsible from the Level 3 switch to the tandem or end office that provides access to the specific service in question (*e.g.,* OS-DA, 911, etc.). SBC Ex. 1.0 (Albright Direct) at 27.

Like OS-DA, 911, and BLVI traffic, mass calling trunks carry *only* Level 3-originated traffic. "Mass Calling" trunk groups (also referred to as choke trunks or high volume call in trunks) are trunks used to deliver High-Volume Media-Stimulated ("HVMS") calls to a choke network. SBC Ex. 1.0 (Albright Direct) at 27. For example, Mass Calling trunk groups deliver

traffic in situations where there is a mass calling event, such as American Idol voting, radio station contests, or concert ticket sales. *Id.* at 27; *see also* Level 3 Ex. 2.0 (Wilson Direct) at 10. These trunk groups ensure the reliability of the Public Switched Telephone Network during times of high volume calling, or High Volume Call-In ("HVCI"). SBC Ex. 1.0 (Albright Direct) at 27. Without such trunk groups, mass calls could quickly overwhelm SBC's switches, preventing customers from obtaining a dial tone to call 911 or other emergency services. Because a mass calling event could trigger a network failure (and, hence, a delay in prompt emergency services), it is reasonable to expect all CLECs (including Level 3) to provide adequate mass calling choke trunking for calls originated by their customers. And because these trunks (and facilities on which they ride) carry *only* mass calls originated by CLEC customers, it is reasonable to expect CLECs (including Level 3) to shoulder the financial burden associated with such trunks (and facilities).

Furthermore, it is also appropriate for Level 3 to be financially responsible for Meet Point trunk groups and the facilities on which they ride. These trunk groups benefit only Level 3 customers; the traffic they carry passes between those customers and IXCs – none of it originates from or terminates to SBC customers. SBC Ex 1.0 (Albright Direct) at 27. More specifically, Meet Point trunk groups are trunks used to deliver InterLATA calls, originated by or terminated to Level 3 customers, to or from the appropriate IXC presubscribed by the customer to handle InterLATA calls. *Id.* at 27-28. Such trunks, and the facilities that carry them, provide absolutely no benefit to SBC, and SBC should not bear the burden of providing them. *Id*.

NIM ISSUE 7: **SHOULD THE AGREEMENT, IN ADDITION TO ALLOWING LEVEL 3 TO INTERCONNECT PURSUANT TO THE PHYSICAL COLLOCATION APPENDIX AND TO THE APPLICABLE STATE TARIFF ALSO ALLOW LEVEL 3 TO INTERCONNECT PURSUANT TO UNSPECIFIED APPLICABLE LAW?**

ICA Reference: Appendix NIM §§ 3.1.1, 3.2.1

The dispute over NIM Issue 7 concerns the following language (in bold underline) proposed by Level 3:

> Level 3 may Interconnect using the provisions of Physical Collocation as set forth in Appendix Physical Collocation, applicable state tariff **or according to Applicable Law**.

Innocuous as Level 3's proposed insert may appear at first blush, it should be rejected because it is unnecessary and confusing.

The purpose of the parties' interconnection agreement is to set forth as precisely as possible the parties' rights and obligations with respect to the matters that are subject to section 251 of the 1996 Act. To the extent that there is any pertinent "applicable law," Level 3 should have brought – and presumably did bring – that law to the Commission's attention in its testimony and advocated its express inclusion in the Agreement. To the extent that Level 3 is concerned that some "applicable law" may come into existence in the future and should be taken into account, that concern is already addressed by the intervening law provision in the Agreement, which will allow Level 3 to incorporate that specific applicable law into the ICA.

SBC's opposition to Level 3's proposed language does not mean that SBC will not comply with the applicable law. Quite the contrary, SBC has every intention of complying with all applicable law, and if SBC fails to do so, it would – by definition – face whatever consequences the law affords for violations. Nonetheless, Level 3's vague reference to

"applicable law" adds nothing substantively, but would create confusion and would be an invitation to disputes later about what is and what is not "applicable law."

NIM ISSUE 8: SHOULD A NON-SECTION 251/252 SERVICE SUCH AS LEASED FACILITIES BE GOVERNED BY THIS AGREEMENT OR ARBITRATED IN THIS SECTION 251/252 PROCEEDING?

ICA Reference: Appendix NIM § 3.3.1

The parties' dispute over NIM Issue 8 is whether the following language proposed by Level 3 should be included in the interconnection agreement:

> **Where facilities are available, LEVEL 3 may lease facilities from SBC-13STATE on terms and conditions no less favorable than SBC-13STATE provides to itself or any other LEVEL 3, IXC or any other regulated carrier, whether such terms and conditions are subject to Title 2 of the Act, as defined in Section 5 of this Appendix.**

Level 3's proposed language should be rejected because it seeks to have a non-section 251/252 service, "leased facilities," governed by the interconnection agreement and, presumably, priced at regulated prices. Any voluntary offering by SBC to provide such facilities, however, should be governed by separate agreement (not by an ICA) and the price for such an offering should be market-based (not regulated).

Not every potential dispute between carriers is subject to arbitration under Section 252 of the 1996 Act. An arbitration proceeding is entirely a creation of federal statute, and the state commission conducting such an arbitration is only empowered to act within the limits of authority granted by Section 252. And Section 252, in turn, authorizes State commissions only to arbitrate issues relating to the duties imposed by Sections 251(b) and (c). SBC sets forth in full the basis for its position in this regard in its position on IC Issue 10, which is incorporated here by reference.

Through its proposed language for NIM Issue 8, Level 3 seeks to have "leased facilities" arbitrated and governed by the interconnection agreement. But such leased facilities do not fall within SBC's obligations under Section 251(b) with respect to resale, number portability, dialing parity, access to rights of way, and reciprocal compensation. Nor do leased facilities fall within SBC's obligations under Section 251(c) with respect to the duty to negotiate and provide interconnection, access to UNEs, resale, notice of changes and collocation. Accordingly, SBC concludes, "leased facilities" are not subject to arbitration and terms relating to such facilities should not be included in the interconnection agreement.

Level 3's testimony does not appear to specifically address NIM Issue 8, but in the NIM DPL Level 3 states: "This language is necessary to make clear that, in entering this agreement, Level 3 does not waive its rights to obtain nondiscriminatory interconnection or forms of interconnection no less favorable to that provided by SBC to itself or any other carrier." This purported "support" for Level 3's position is confusing because Level 3's proposed language has nothing to do with SBC's interconnection obligations – rather, it requires SBC to provide facilities.

If Level 3 contends that SBC – as part of its obligation to provide interconnection under Section 251(c)(2) – is required to provide the facilities and equipment necessary for that interconnection, it is wrong. Section 251(c)(2) places on SBC "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." In other words, SBC must allow a CLEC to interconnect (*i.e.,* physically link) *its* facilities with SBC's facilities, but SBC does not have to provide the interconnection facilities and equipment for the CLEC. In fact, Level 3 itself acknowledges that it is responsible for the interconnection facilities and equipment on its side of the POI. Level 3

Ex. 2.0 (Wilson Direct) at 11-12; Level 3 Ex. 1.0 (Hunt Direct) at 36-37; Level 3 Ex. 3.0 (Gates Direct) at 17-18. Hence, its proposed language here likely means one thing: Level 3 is attempting to subsidize facilities cost on its side of the POI by obtaining those facilities from SBC at regulated prices. That, however, cannot lawfully be permitted. If SBC chooses to provide non-section 251 services, like leased facilities, it must be permitted to do so via a separate agreement and such services should be provided at market-based (not regulated) prices.

Furthermore, if Level 3 is suggesting that it should be permitted to obtain from SBC the facilities from Level 3's switch to the POI as unbundled dedicated transport, it is again wrong. To begin with, SBC is not required to provide any network element *outside* of SBC's local network – and the facilities on Level 3's side of the POI clearly are outside of SBC's local network. So too are the transmission facilities that link SBC's network with Level 3's network. As the FCC held in the *TRO* (¶ 366): "[T]ransmission links that simply connect a competing carrier's network to the incumbent LEC's network are not inherently a part of the incumbent LEC's local network. Rather, they are transmission facilities that exist outside the incumbent LEC's local network."

Along this same line, the facilities from Level 3's switch to the POI do not meet the FCC's definition of dedicated transport. In paragraph 365 of the *TRO,* the FCC stated that its previous definition of dedicated transport was "overly broad," and instead held that dedicated transport was "limit[ed] . . . to those transmission facilities connecting incumbent LEC switches and wire centers within a LATA." The FCC further stated: "[W]e find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *Id.* Simply put, under the FCC's rules, SBC is not required to provide the "leased facilities" Level 3 seeks.

G. OUT OF EXCHANGE ISSUES

OET ISSUE 1: **SHOULD THE APPLICABILITY OF THE OET APPENDIX BE LIMITED TO LEVEL 3'S OPERATIONS SOLELY OUTSIDE OF SBC-13STATE'S INCUMBENT LOCAL EXCHANGE AREAS?**

ICA Reference: Appendix OET § 2.1

Before discussing the particular language in dispute in Out of Exchange Traffic ("OET") Issue 1 (or any of the other OET issues), SBC first addresses the purpose of the Out of Exchange Traffic Appendix.

Under Section 251(c) of the Telecommunications Act of 1996, an incumbent carrier such as SBC may be subjected to certain obligations, including a duty to provide interconnection, access to UNEs, collocation and resale, to requesting carriers. However, the Act makes clear that SBC's 251(c) obligations to requesting carriers are limited to the geographic areas in which SBC acts as the incumbent local exchange carrier. *See* 47 U.S.C. § 251(h). Thus, for instance, if Verizon is the ILEC in a particular geographic area, it is Verizon, not SBC, that has 251(c) obligations to Level 3 with respect to that geographic area. The OET Appendix does not relate to SBC's obligations under Section 251(c)(3), as those are dealt with in other sections of the parties' agreement (*e.g.*, Appendix NIM and Appendix ITR). SBC Ex. 2.0 (Chapman Direct) at 3-4; *see also* SBC Ex. 7.0 (McPhee Direct) at 47-49. Rather, the purpose of the OET Appendix is to address traffic that originates or terminates with a Level 3 end-user outside of the SBC incumbent local exchange area. *See* SBC Ex. 2.0 (Chapman Direct) at 3-4.

Consistent with the narrow focus of the OET Appendix, SBC proposes additional language that makes clear that the obligations set forth in the OET Appendix are separate and apart from SBC's obligations as an ILEC under Section 251(c). As will be discussed below with respect to the certain disputed contract provisions, Level 3 opposes such language. Level 3 also

opposes certain contract language in the OET Appendix that would govern how Out of Exchange Traffic will be handled. Such language is appropriate and necessary, and Level 3's alternative language, to the extent it proposed any, is vague and confusing.

* * *

With respect to the particular language in dispute in OET Issue 1, SBC proposes language for section 2.1 of the OET Appendix that would make clear that the OET Appendix relates to Level 3's operations outside of SBC's "incumbent local exchange areas." Level 3 opposes inclusion of the phrase "incumbent local exchange areas."

Level 3's positions on this issue are untenable. While the 1996 Act addresses interconnection between Level 3 and SBC in those areas where SBC is the incumbent local exchange carrier, it does so in Section 251(c). But those 251(c) obligations are not what the OET Appendix addresses. *See* SBC Ex. 7.0 (McPhee Direct) at 49-51; SBC Ex. 2.0 (Chapman Direct) at 3-5. The OET Appendix, as reflected in the language of section 2.2 agreed to by the parties, relates to interconnection between Level 3 and SBC pursuant to Section 251(a), not Section 251(c), of the Act. SBC's proposed language simply makes that clear.

For its part, Level 3 offered no testimony specifically addressing section 2.1 of the OET Appendix. Moreover, if Level 3's position were accepted and the phrase "incumbent local exchange areas" were stricken from section 2.1, the remaining language would be vague at best and nonsensical at worst. That is, the sentence would recite that Level 3 intended to operate and provide service "outside of SBC-13STATE" or "outside of SBC Illinois."[85] Whether that, in

[85] The parties negotiated across SBC's entire 13-state region and therefore the interconnection agreement is written in such a manner as to be utilized in states other than just Illinois. Thus, it uses terms such as "SBC-13STATE," rather than "SBC Illinois." In the context of this issue being arbitrated in this state, SBC13-STATE means "SBC Illinois."

fact, would mean that same thing as the language that SBC proposes is unclear; if it does not, what does it mean? In either case, Level 3's proposed deletion should be rejected.

For these reasons, this Commission should adopt SBC's language for section 2.1 of the OET Appendix.

OET ISSUE 2: **SHOULD THE OET APPENDIX PROVIDE THAT IN THOSE AREAS THAT ARE OUTSIDE SBC'S INCUMBENT TERRITORY, SBC IS NOT OBLIGATED TO PROVIDE UNES, COLLOCATION, RESALE OR INTERCONNECTION PURSUANT TO SECTION 251 OF THE ACT?**

ICA Reference: Appendix OET § 2.3

OET Issue 2 really goes to the heart of the parties' disagreement relating to the OET Appendix. SBC's proposed language for section 2.3 explains that SBC's obligations under Section 251(c) are set forth in *other* appendices to the parties' interconnection agreement. It recites that SBC's obligations pursuant to Section 251(c) are limited to those geographic areas in which SBC is the incumbent local exchange carrier and that SBC does not have Section 251(c) obligations in areas outside of its incumbent local exchange area. *See* SBC Ex. 2.0 (Chapman Direct) at 3-4. SBC's proposed language simply recognizes this fact and makes clear the scope of the parties' OET Appendix.

Level 3 does not seem to dispute SBC's understanding of the law. Instead, Level 3 seems to suggest that SBC's proposed language would somehow limit SBC's obligations to provide interconnection. Level 3's concerns are not warranted. The language proposed by SBC does not limit SBC's obligations. It simply clarifies that other appendices in the ICA address the terms and conditions governing Level 3's access to UNEs, collocation, interconnection, and resale as required by Section 251(c)(2), (3), (4) and (6). SBC Ex. 2.0 (Chapman Direct) at 4.

OET ISSUE 3: **SHOULD LANGUAGE RELATING TO THE PASSING OF SS7 SIGNALING INFORMATION THAT WAS AGREED TO FOR USE IN THE ITR APPENDIX ALSO BE INCLUDED IN THE OET APPENDIX?**

ICA Reference: Appendix OET § 3.1

SBC's proposed language for section 3.1 of the OET Appendix addresses the type of SS7 signaling information that Level 3 will provide to SBC. Level 3 opposes this language.

The Commission should adopt SBC's proposed language because it simply reflects what is contained in the Telcordia industry guidelines that describe the SS7 protocol parameters used to determine the jurisdictional nature of calls for the purpose of accurate billing. SBC Ex. 8.0 (Novack Direct) at 12. The language also reflects Telcordia guidelines for other parameters, including, but not limited to, privacy indicators and parameters that enable SBC to route an end user's call to that end user's chosen long distance carrier. *Id.*

It is not at all clear why Level 3 opposes this language. Level 3 did not submit any testimony specifically addressing it. Moreover, the language that SBC proposes is identical to language that has already been agreed to by the parties in ITR section 5.4.8. SBC Ex. 8.0 (Novack Direct) at 12. Appendix ITR, including the agreed-to language in section 5.4.8, pertains to interconnection within SBC's operating territory. *Id*. at 14. As discussed above, the OET Appendix applies to Level 3 connectivity to SBC in the event Level 3 is situated in the same LATA as SBC, but is not situated within SBC's operating territory in the LATA. While these appendices cover different traffic, it is appropriate to include the same language in each. *Id*. As SBC's witness Novak testified, the Telcordia guidelines apply equally to both situations. *Id*. at 12-13. SBC's language should therefore be adopted.

OET ISSUE 4: **(A) SHOULD EACH PARTY BE REQUIRED TO ADMINISTER ITS NETWORK TO ENSURE ACCEPTABLE SERVICE LEVELS TO ALL USERS OF ITS NETWORK SERVICES?**

(B) SHOULD THE OET APPENDIX INCLUDE TERMS PRESERVING EACH PARTY'S RIGHT TO IMPLEMENT PROTECTIVE NETWORK MANAGEMENT CONTROLS AND TRAFFIC REROUTES?

(C) SHOULD THE OET APPENDIX INCLUDE A PROVISION THAT THE PARTIES WILL COOPERATE AND SHARE INFORMATION REGARDING EXPECTED TEMPORARY INCREASES IN CALL VOLUMES?

ICA Reference: Appendix OET §§ 3.3, 3.4, 3.5, 3.6

OET Issue 4 pertains to several provisions that SBC proposes to include in the OET Appendix regarding the mutual obligations of Level 3 and SBC. Although Level 3 opposes each of them, it has offered no testimony explaining its position regarding the specific language at issue. Indeed, Level 3 has agreed to the same language elsewhere in the parties' interconnection agreement. Each provision is reasonable and appropriate and should be adopted by this Commission.

SBC's proposed section 3.3 relates to each party's administration of its network. SBC proposes the seemingly noncontroversial propositions that "[e]ach party will administer its network to ensure acceptable service levels to all users of its network services," that service levels are considered acceptable when there is "little or no delay" to establish connections, and that the parties will exchange 24-hour contact numbers. SBC administers its network to ensure acceptable service levels to all users of its network services, and expects the same from Level 3 and other carriers. Similarly, each carrier should have an obligation to ensure that its network operates at acceptable levels; failure to do so could cause damage to the other party's network or interfere with end user service. Level 3 opposes this language, despite the fact that it agreed to

language identical to section 3.3 in GTC section 36.2 and failed to present any testimony specifically addressing this language. SBC Ex. 1.0 (Albright Direct) at 66-67.

SBC's proposed sections 3.4 and 3.5 relate to protective network management controls and traffic reroutes. The parties have already agreed to language identical to sections 3.4 and 3.5 in ITR sections 10.1.1 and 10.2.1. These provisions are as appropriate in the OET Appendix as they are in the ITR Appendix. SBC Ex. 1.0 (Albright Direct) at 67-68. The only difference, as explained above, is that the ITR Appendix deals with traffic in areas where SBC is the ILEC, while the OET Appendix deals with traffic outside of SBC's ILEC territory. *Id*.

Finally, Level 3 opposes SBC's proposed language for section 3.6 of the OET Appendix relating to cooperation between the parties and sharing of information regarding expected temporary increases in call volumes. However, the parties agreed to language identical to section 3.6 in ITR section 10.3.1. SBC Ex. 1.0 (Albright Direct) at 68. While the ITR and OET Appendices are different, the same reasons that this language is appropriate in the ITR Appendix apply to the OET Appendix. *Id*. Notably, Level 3 does not suggest otherwise.

Accordingly, the Commission should adopt SBC's proposed language for sections 3.3 through 3.6 of the OET Appendix.

OET ISSUE 5: **(A) SHOULD SECTION 4.1 REFERENCE LEVEL 3 HAVING A POI WITHIN A LATA OR WITHIN AN EXCHANGE AREA?**

(B) SHOULD THE SCOPE OF THE OET APPENDIX GOVERN THE EXCHANGE OF "TELEPHONE TRAFFIC, ISP-BOUND TRAFFIC AND IP-ENABLED SERVICES TRAFFIC," OR "SECTION 251(b)(5) TRAFFIC" AND ISP-BOUND TRAFFIC"?

(C) SHOULD THE AGREEMENT PROVIDE THAT SBC WILL ACCEPT LEVEL 3'S "OET TRAFFIC" OR "TELECOMMUNICATIONS TRAFFIC"?

(D) SHOULD LEVEL 3 BE REQUIRED TO DIRECT END OFFICE TRUNK ONCE TRAFFIC BETWEEN THE PARTIES EXCEEDS ONE DS1 (OR 24 TRUNKS)?

(E) SHOULD A NON-251/252 SERVICE SUCH AS TRANSIT SERVICE BE NEGOTIATED SEPARATELY?

ICA Reference: Appendix OET § 4.1

Each instance of disputed language in section 4.1 of the OET Appendix can be resolved in the same manner as the Commission resolves other disputes between the parties:

- With respect to subpart (a) of OET Issue 5, the Commission should direct the parties to resolve the language in a manner consistent with the parties' resolution of NIM 2.

- With respect to subpart (b) of OET Issue 5, please see the discussion of OET Issue 9 below, as well as discussion of IC Issues 1, 3, 5 and 10a and GT&C Definitions Issues 8 and 18.

- With respect to subpart (c) of OET Issue 5, as argued at length above, the OET Appendix should be limited to "OET Traffic" and not expanded to include "Telecommunications Traffic." Moreover, as discussed in connection with IC Issues 1, 3, 5, and 10a and GT&C Definitions Issues 8 and 18, the Level 3-proposed term "Telecommunications Traffic" is overbroad and vague.

- With respect to subpart (d) of OET Issue 5, please see the discussion of ITR Issue 12. As noted in the prefiled testimony of Carl Albright, Level 3 and SBC have agreed to establish a direct end office trunk group ("DEOT") once traffic exceeds one DS1 for 3 months. SBC Ex. 1.0 (Albright Direct) at 69-70. The OET Appendix should similarly provide

that Level 3 will establish a DEOT when the amount of OET traffic reaches a certain threshold. DEOTs help conserve tandem switch and trunk resources and make the network more efficient. SBC establishes DEOTs for itself under similar, but more stringent, guidelines, and also requires its affiliates to establish DEOTs at a 24 trunk threshold. *Id*.

- With respect to subpart (e) of OET Issue 5, see the discussion of ITR Issues 5-9 and IC Issue 11e.

OET ISSUE 6: **SHOULD LEVEL 3 BE REQUIRED TO TRUNK TO EACH TANDEM IN THE LATA?**

ICA Reference: Appendix OET § 4.2

See the discussion of ITR Issue 4(a).

OET ISSUE 7: **SHOULD LANGUAGE RELATING TO TRUNK GROUPS FOR ANCILLARY SERVICES THAT WAS AGREED TO FOR USE IN THE ITR APPENDIX ALSO BE INCLUDED IN THE OET APPENDIX?**

ICA Reference: Appendix OET § 4.3

Level 3 and SBC agree that language from the ITR Appendix will govern trunk groups for ancillary service. However, only SBC proposes that actual substantive language be included, and that language is nearly identical to the language in ITR section 3.2. Level 3, in contrast, proposes a vague reference to the ITR Appendix, but does not refer to a particular section. SBC Ex. 1.0 (Albright Direct) at 71. SBC's language should be adopted.

OET ISSUE 8: **(A) SHOULD SBC BE REQUIRED TO DOUBLE TANDEM SWITCH CALLS TO/FROM LEVEL 3?**

(B) SHOULD SBC END OFFICE(S) PROVIDE LEVEL 3 ACCESSIBILITY ONLY TO THE NXXS THAT ARE SERVED BY THAT END OFFICE?

ICA Reference: Appendix OET § 4.9

SBC has proposed substantive language that addresses OET Issue 8. Level 3 has proposed nothing more than a vague reference to "relevant terms and conditions from Appendix ITR." The Commission should reject Level 3's language and adopt SBC's.

SBC's proposal provides Level 3 with access to any subtending offices where Level 3 establishes a trunk group to that serving tandem. SBC Ex. 1.0 (Albright Direct) at 71. It is reasonable and appropriate to require Level 3 to establish trunks to each tandem in a multi-tandem LATA. While a POI establishes the point at which SBC and Level 3 facilities meet to interconnect the parties' networks, trunk groups are established so traffic can be exchanged between the two networks. *Id*. Each SBC tandem serves its own set of end offices and SBC must deliver calls from Level 3 to all of SBC's end users. *Id.* If Level 3 only establishes a trunk group to the tandem that is near the POI, only those calls to SBC end users that are behind that tandem can be efficiently delivered. *Id.* Calls destined for SBC end users behind other tandems must be switched at the first tandem to redirect the call to the proper tandem, then switched a second time at that tandem to the end user's end office for termination, which is not an efficient method of delivering calls from Level 3 to other SBC end users in the LATA. *Id.* at 71-72. This places an immediate burden on SBC in the form of additional points of switching and additional tandem trunk ports for each call to the distant tandems. *Id.* at 72. There are also long-term effects: Redirecting Level 3's traffic from one tandem to another can accelerate tandem exhaust, leading to more frequent tandem switch growth jobs and the need to purchase additional tandems. *Id.* When Level 3 establishes direct trunk groups to every SBC tandem within the LATA, the network functions more efficiently. *Id.*

Moreover, trunk capacity at SBC end office switches is designed for NPA NXX codes that are "homed" at that end office switch; end office switches are not designed to perform a tandem function. *Id.* at 72-73. SBC engineers each of its end office switches to handle the traffic and switching requirements needed to provide service to only the end users that are connected to that particular office. Calls destined for end users that are served by an end office

other than the one at the terminating end of a direct trunk group should be routed to the proper office. *Id*. at 73. Misrouting calls over a direct trunk group forces an end office to function like a tandem, resulting in network resources for that switch being used faster than planned. *Id*. In addition, SBC purchases, administers, and maintains end office switches to function only as end office switches – not as tandem switches. *Id.* Tandem switches perform functions that cannot be performed by end office switches; forcing an end office switch to function like a tandem reduces the level of service provided to its end users. *Id.*[86]

Accordingly, the Commission should adopt SBC's proposed language for OET Issue 8.

OET ISSUE 9: **SHOULD THE OET APPENDIX GOVERN THE EXCHANGE OF "TELECOMMUNICATIONS TRAFFIC AND IP-ENABLED SERVICES TRAFFIC" OR "SECTION 251(b)(5) TRAFFIC AND ISP-BOUND TRAFFIC"?**

ICA Reference: Appendix OET § 5.1

Although a separate OET Appendix is necessary in order to properly delineate between SBC's obligations in those geographic areas in which it is the incumbent and its obligations in areas outside its incumbent local exchange territory, the *types* of traffic at issue are the same under both scenarios. Therefore, for the same reasons set forth in SBC's discussion of IC Issues 1, 3, 5, and 10a and GT&C Definitions Issues 8 and 18, the Commission should adopt SBC's proposal to refer to "Section 251(b)(5) and ISP-Bound Traffic" in OET section 5.1, instead of Level 3's vague "Telecommunications Traffic and IP-Enabled Traffic" terminology.

[86] See also discussion of ITR Issue 12.

OET ISSUE 10: **SHOULD THE OET APPENDIX INCLUDE TERMS DETAILING THE COMPENSATION DUE EACH OTHER FOR EXCHANGING TRANSIT TRAFFIC?**

ICA Reference: Appendix OET §§ 6, 6.1, 6.2, 6.3

See the discussion of ITR Issues 5-9 and IC Issue 11e.

OET ISSUE 11: **(A) SHOULD THE OET APPENDIX GOVERN THE EXCHANGE OF "TELECOMMUNICATIONS TRAFFIC AND IP-ENABLED SERVICES TRAFFIC," OR "SECTION 251(b)(5) TRAFFIC, AND ISP-BOUND TRAFFIC"?**

(B) SHOULD SBC BE ALLOWED TO USE A TWO-WAY DIRECT FINAL TRUNK GROUP TO EXCHANGE TRAFFIC WITH LEVEL 3?

ICA Reference: Appendix OET §§ 9, 9.1, 9.3, 9.7

With respect to subpart (a) of OET Issue 11, see SBC's discussion of OET Issue 9 below, as well as its discussion of IC Issues 1, 3, 5, and 10a and GT&C Definitions Issues 8 and 18.

With respect to subpart (b) of OET Issue 11, SBC proposes that the parties be required to use two-way direct trunk groups to exchange traffic. SBC routes its own InterLATA Section 251(b)(5) and ISP-Bound Traffic over two-way Direct Final ("DF") trunk groups that SBC creates specifically for that purpose. SBC Ex. 1.0 (Albright Direct) at 76. The only traffic routed over two-way DF trunk groups is traffic that originates and terminates within the same InterLATA Extended Area Service (EAS) local calling area. *Id.* SBC is restricted by the Modified Final Judgment and by FCC rules as to the methods by which an ILEC can deliver InterLATA EAS local traffic. *Id.* Any method agreed upon by Level 3 and SBC to exchange InterLATA EAS local traffic must be in compliance with these restrictions. *Id.* Two-way DF trunks best comply with these restrictions. *Id.*

OET ISSUE 12: **SHOULD THE AGREEMENT REQUIRE THE PARTIES TO USE A TWO-WAY DIRECT FINAL TRUNK GROUPS TO EXCHANGE TRAFFIC WITH LEVEL 3?**[87]

ICA Reference: Appendix OET § 9.2

See the discussion of OET Issue 11(b) above.

H. PHYSICAL AND VIRTUAL COLLOCATION ISSUES

PC ISSUE 1: **SHOULD THIS APPENDIX BE THE EXCLUSIVE DOCUMENT GOVERNING PHYSICAL COLLOCATION ARRANGEMENTS BETWEEN LEVEL 3 AND SBC, OR SHOULD LEVEL 3 BE PERMITTED TO ORDER COLLOCATION BOTH FROM THIS APPENDIX AND STATE TARIFF?**

ICA Reference: Appendix PC §§ 4.4, 7.3, 7.3.3

VC ISSUE 1: **SHOULD THIS APPENDIX BE THE EXCLUSIVE DOCUMENT GOVERNING PHYSICAL COLLOCATION ARRANGEMENTS BETWEEN LEVEL 3 AND SBC, OR SHOULD LEVEL 3 BE PERMITTED TO ORDER COLLOCATION BOTH FROM THIS APPENDIX AND STATE TARIFF?**

ICA Reference: Appendix VC §§ 1.2, 1.10

PC Issue 1 and VC Issue 1 present the same question: Should Level 3 be permitted to pick and choose rates, terms and conditions from both its interconnection agreement with SBC and a state tariff, to the extent one is available? The clear answer is no, as Staff concludes and as this Commission held in last year's AT&T/SBC arbitration.

The law does not contemplate the availability of tariffs to CLECs under these circumstances. As at least two federal courts of appeal, including the Seventh Circuit, have held, interconnection agreements are the exclusive vehicle through which a CLEC obtains rates, terms, and conditions for interconnecting with an ILEC or obtaining access to an ILEC's UNEs as

[87] OET Issue 12 was inadvertently mislabeled OET ISSUE 11 in the DPL jointly filed by the parties.

provided for in Section 251 of the Telecommunications Act of 1996. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003); *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497-98 (7th Cir. 2004); *Verizon North, Inc. v. Strand*, 367 F.3d 577, 584 (6th Cir. 2004); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940-41 (6th Cir. 2002).

Second, the FCC has warned that the availability to a CLEC of an alternate set of collocation terms and conditions, apart from its interconnection agreement, would serve as a disincentive to the traditional give-and-take of negotiations:

> On the record now before us, we find that the pick-and-choose rule is a disincentive to give and take in interconnection negotiations. We also find that other provisions of the Act and our rules adequately protect requesting carriers from discrimination. Therefore, we conclude that the burdens of retaining the pick-and-choose rule outweigh the benefits. We also find the all-or-nothing approach to be a reasonable interpretation of section 252(i) that will "restore incentives to engage in give-and-take negotiations while maintaining effective safeguards against discrimination.

Second Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 F.C.C. Rcd. 13,494, ¶ 11 (rel. July 13, 2004) ("*Second Report and Order*") (emphasis added). While the context in which the FCC made this pronouncement was different than that presented here, the reasoning is nonetheless valid here. Just as the FCC concluded that a CLEC ought not to be able to pick and choose collocation rates, terms, and conditions from another interconnection agreement, a CLEC ought not be permitted to pick and choose collocation rates, terms, and conditions from a collocation tariff. Allowing Level 3 to "pick and choose" specific sections (or subsections) of language from a collocation tariff is contrary to the premise of the FCC's Second Report and Order.

Recently, the Commission Staff made this same link between the FCC's elimination of the "pick-and-choose" rule and ordering from a tariff. In the just-concluded arbitration case involving XO Communications, the Staff recognized that the "essential logic" of the FCC's

decision to eliminate the "pick-or-choose" rule supported rejection of a proposal by XO, similar to Level 3's position in this case, that it be allowed to order facilities or services via a tariff, even when those facilities and services are available under its interconnection agreement. Staff of the Illinois Commerce Commission's Revised Initial Brief, Docket 04-0371, pp. 98-99 (July 19, 2004). SBC Ex. 5.1(Fuentes Supp.) at 4. Indeed, in this case, Level 3's proposed Section 7.3 for the Collocation Appendix, if adopted, would allow it to apply rates contained in a state-specific tariff, rather than the rates contained in the ICA's Appendix pricing, to collocation. Thus, Level 3 seeks the right to "pick-and-choose" between tariff and contract rates while retaining all of its rights under the other contractual terms and conditions, thereby upsetting the parties' negotiated bargain. This is precisely the situation that the FCC was attempting to avoid in rejecting the "pick-or choose" rule.

Third, Level 3 does not need to order from a tariff. Through the negotiation and arbitration process, interconnection agreements address all the rates, terms, and conditions pertaining to physical and virtual collocation. Level 3 has had the opportunity to request and/or arbitrate any rates, terms and conditions it felt that it needed in its interconnection agreement.

There is no merit to Level 3's suggestion that it needs to be able to order from a tariff in order to obtain access to collocation offerings not made available to it through its interconnection agreement. When SBC makes a voluntary offering to CLECs, it does so in the context of a negotiated interconnection agreement or an Accessible Letter, not through a tariff. SBC Ex. 5.0 (Fuentes Direct) at 5-6. Moreover, in the case of voluntary offerings made through a negotiated interconnection agreement, Level 3 can opt into such a negotiated agreement pursuant to Section 252(i) of the 1996 Act. With respect to Accessible Letters, SBC offers each CLEC an opportunity to amend its existing interconnection agreement in light of changes in law or new,

generally available offerings. *Id.* To the extent that there is a change in law of which Level 3 seeks to take advantage and SBC does not publish an Accessible Letter, Level 3's agreement provides a mechanism for permitting Level 3 to take advantage of the change in law. *See* GTC Appendix, § 21. Thus, Level 3 does not need to be able to order out of a tariff to ensure it has access to the most current collocation offerings.

Furthermore, permitting Level 3 to pick and choose from two different sets of rates, terms and conditions would be administratively confusing and burdensome for SBC. SBC Ex. 5.0 (Fuentes Direct) at 5. There is no compelling reason to allow Level 3 to order out of a tariff, in addition to ordering from its interconnection agreement with SBC, which is the result of arms-length negotiation and arbitration.

Staff witness Omoniyi agrees with SBC Illinois that Level 3 should not be permitted to order from a tariff when the same collocation arrangements are available through Level 3's interconnection agreement with SBC Illinois. Staff Ex. 2.0 at 20-22. Staff's position is consistent with the approach taken by this Commission in the 2003 AT&T arbitration. There, the Commission concluded that "AT&T should not be permitted to purchase products or services from SBC's tariffs when they were already included in the ICA, unless AT&T incorporated the tariff terms and all legitimately related rates, terms and conditions into the ICA." The language adopted by the Commission for use in the AT&T/SBC Illinois arbitration makes absolutely clear that a CLEC is not entitled to order from a tariff if the product or service is already available through the interconnection agreement:

> Section 1.30.2 – Except as provided in Section 1.30.4 below, the Parties agree that the rates, terms and conditions of this Agreement will not be superceded by the rates, terms and conditions of any tariff SBC may file, absent Commission order to the contrary. The Parties agree that AT&T is not precluded from ordering products and services available under any effective SBC tariff or any tariff

> that SBC may file in the future provided that AT&T satisfies all conditions contained in such tariff and provided that the products and services are not already available under this Agreement. . . .

SBC Ex. 5.1 (Fuentes Supp.) at 3.

Mr. Omoniyi thus endorses SBC Illinois's proposed language with one modification. Specifically, he suggests that that "Level 3 should only be permitted to order from [the] effective SBC tariff or any tariff SBC might file in the future as long as this agreement does not contain rates, terms and conditions for the products or services Level 3 seeks to purchase out of the tariff." Staff Ex. 2.0 at 20-21. While SBC Illinois does not believe that any additional contract language is necessary to accommodate Mr. Omonoyi's concern, SBC Illinois will not object to Staff's proposed modification. SBC Ex. 5.1 (Fuentes Supp.) at 2.[88]

Accordingly, the Commission should adopt SBC's proposed language for PC Issue 1 and VC Issue 1.

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[88] SBC Illinois included in its supplemental testimony contract language for section 4.4 of the Physical Collocation Appendix and section 1.2 of the Virtual Collocation Appendix that would effectuate Mr. Omoniyi's proposed modification:

> Notwithstanding the above, if a type of collocation arrangement is not available to Level 3 through this interconnection agreement with SBC Illinois but is available through an effective tariff, Level 3 may purchase such type of collocation arrangement from the effective tariff, so long as such type of collocation arrangement would not have been available to Level 3 through this interconnection agreement had Level 3 exercised its rights under the change of law provision in this Agreement or an SBC Illinois Accessible Letter.

SBC Ex. 5.1 (Fuentes Supp.) at 2.

PC ISSUE 2: **SHOULD LEVEL 3 BE PERMITTED TO COLLOCATE EQUIPMENT THAT SBC HAS DETERMINED IS NOT NECESSARY FOR INTERCONNECTION OR ACCESS TO UNES OR DOES NOT MEET MINIMUM SAFETY STANDARDS?**

ICA Reference: Appendix PC § 6.13

VC ISSUE 2: **SHOULD LEVEL 3 BE PERMITTED TO COLLOCATE EQUIPMENT THAT SBC HAS DETERMINED IS NOT NECESSARY FOR INTERCONNECTION OR ACCESS TO UNES OR DOES NOT MEET MINIMUM SAFETY STANDARDS?**

ICA Reference: Appendix VC § 1.10.10

PC Issue 2 and VC Issue 2 present the same question: In those cases where the parties disagree whether the equipment that Level 3 seeks to collocate is necessary for interconnection or access to UNEs or whether it meets minimum safety standards, should Level 3 be allowed to collocate the equipment, while the dispute is resolved? SBC (and Staff) maintain that Level 3 should not be allowed to do so.

Level 3 does not dispute that it may not collocate equipment that does not comply with applicable safety standards or is not necessary for interconnection or access to UNEs. Indeed, Level 3 has repeatedly agreed to provisions in the physical and virtual collocation appendix that make this clear (*see*, *e.g.*, Physical Collocation Appendix, §§ 4.3, 6.1, 6.11, 8.1, 9.7; Virtual Collocation Appendix, §§ 1.1, 1.10.2, 1.10.8, 1.10.11, 1.12.2, 3.1.) SBC Ex. 5.0 (Fuentes Direct) at 7.

Despite this, Level 3 wants to be able to collocate equipment that is non-compliant, while the dispute over the equipment's compliance is resolved. SBC opposes this because, by way of example, Level 3's approach would permit Level 3 to collocate a stand-alone switch, so long as Level 3 disputed SBC's conclusion that such equipment could not be collocated. This is plainly

unreasonable. The reasonable course is to wait until the dispute resolution process is completed, rather than to permit Level 3 to collocate a piece of equipment that may be illegal.

Moreover, Level 3's language would permit Level 3 to collocate a piece of equipment that SBC knows to be dangerous and not in compliance with safety standards. Clearly the law does not mandate this. Permitting such collocation threatens the integrity of SBC's and others' networks and would permit Level 3 to ignore federal law. SBC Ex. 5.0 (Fuentes Direct) at 8. Staff witness Omoniyi echoed SBC Illinois' observation, noting that this issue implicates "not only the equipment of Level 3 and SBC, but also the safety of the entire network." Staff Ex. 2.0 at 26. "Network safety issues are always paramount." *Id*. SBC is ultimately responsible for its network, as well as maintaining and testing it not only for itself, but also for the CLECs that use it. SBC Ex. 5.0 (Fuentes Direct) at 8. Therefore, it should be SBC in the first instance that determines what may threaten the integrity of its network. *Id*. Where there is a genuine dispute between the parties about whether a piece of equipment is safe, the prudent course is to not permit it to be collocated until the dispute about its safety can be resolved.

Finally, although Level 3 has suggested that SBC's proposed language is a "departure" from the existing agreement, Level 3 is not able to point to any provision in the parties' current interconnection agreement that addresses the question presented by PC Issue 2 and VC Issue 2. And although Level 3 opposes SBC's proposed language, it has not proposed any alternative language. Therefore, under its preferred course of action for this Commission, the parties' interconnection agreement would remain silent on this issue. That is clearly an unreasonable result.

Staff witness Omoniyi endorses SBC Illinois's position, with a minor addition that is acceptable to SBC Illinois. He proposes that "SBC []make its list of equipment that meets its

collocation requirement known to Level 3 as soon as there is a request for collocation of equipment from Level 3." Staff Ex. 2.0 at 27. SBC presently does this. It provides CLECs with access (via the SBC-CLEC online Web site: https://clec.sbc.com/clec/) to an All Equipment List ("AEL") which identifies all equipment which is currently deployed in one or more central offices in the SBC network. SBC Ill. Ex. 5.1 (Fuentes Supp.) at 5. All of the equipment identified on the AEL has met the minimal NEBS level 1 safety requirements. To accommodate Staff's concern, however, SBC Illinois is willing to add language to the contract that states that SBC Illinois will provide such a list.[89]

For these reasons, the Commission should adopt SBC's proposed language, with the minor modification suggested by Staff.

PC ISSUE 3: **SHOULD THIS APPENDIX INCLUDE LANGUAGE ADDRESSING BILLING DISPUTE RESOLUTION, ESCROW ISSUES, DISPUTED AMOUNTS, INFORMAL AND FORMAL DISPUTE RESOLUTION MECHANISMS, ARBITRATIONS, DEFAULT IN PERFORMANCE, ETC?**

ICA Reference: Appendix PC § 29

Both parties have proposed language that addresses collocation dispute resolution. Level 3 proposes to include language that references the dispute resolution provisions of the GT&C Appendix. SBC is proposing a dispute resolution process that is specific to collocation.

A separate dispute resolution process is necessary for collocation disputes. Collocation, unlike other SBC product offerings, deals with actual real estate, and SBC's obligations to

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[89] SBC Illinois proposes to add to section 6.13 of the Physical Collocation Appendix and section 1.10.10 of the Virtual Collocation Appendix the following language:

> Following receipt of an application for collocation from Level 3, SBC Illinois will make available to Level 3 a list of equipment that is currently deployed within SBC Illinois's central offices.

SBC Ill. Ex. 5.1 (Fuentes Supp.) at 5-6.

provide requesting CLECs with physical access to and "rental" of sometimes scarce parts of SBC's premises. SBC Ex. 5.0 (Fuentes Direct) at 10. SBC cannot allow disputes about collocation to linger for months or years, especially if the ultimate result is that the CLEC will vacate its collocation space, thus making it available to other CLECs. *Id.*

The timetable for disputing a collocation bill under the Level 3 proposal – 24 months – is too long. Unlike other bills, collocation bills typically do not change on a month-to-month basis. The recurring charges associated with collocation include such items as leased space and power, and unless Level 3 increases or decreases its space, requests more power capacity or adds equipment, the bills will typically be the same month after month. Thus, Level 3 simply does not need two years to determine whether a bill has a mistake.

SBC's proposed dispute resolution process is straightforward and clear. Despite Level 3's assertions of complexity and confusion, Level 3 does not point to any provision that it does not understand. SBC's proposal provides a multi-step process that gives both parties opportunities to work through the dispute, including through informal discussions and elective or mandatory arbitration. SBC Ex. 5.0 (Fuentes Direct) at 9-10. The proposal includes deadlines for each stage of the process, to ensure a swift resolution of any disputes. *Id.* at 10. The proposed language, which is what SBC proposes to all CLECs wishing to establish and maintain collocation within an SBC premise, is fair and reasonable. *Id.*

Additionally, there is not anything confusing or unusual about the proposed escrow requirements either. The escrow requirements that are described in section 29.3 of SBC's proposed physical collocation appendix are clear, concise, and based upon basic business needs. SBC Ex. 5.0 (Fuentes Direct) at 11-12. They discuss, for example, that the third-party escrow agent be mutually agreed upon by both parties. SBC also expects that the escrow agent will be

located within the continental United States; that it not be a Level 3 affiliate; that it be authorized to handle Automatic Clearing House transfers; that the account be interest-bearing; and that the escrow agent be willing to certify that it is in compliance with all of the above. *Id.* None of this is complex or controversial. SBC is seeking to ensure both its rights as well as Level 3's by requiring that the escrow agent meet these basic conditions, which are merely common-sense, standard business practices. *Id*. at 11.

The request for an escrow account is not unusual, and is in fact, requested of all CLECs by SBC. SBC Ex. 5.0 (Fuentes Direct) at 12. And Level 3 seemingly does not oppose the idea of an escrow requirement in general, since Level 3 agreed to an escrow requirement within the GT&C appendix. *Id.*

For these reasons, the Commission should adopt SBC's proposed language for section 29 of the Physical Collocation Appendix.

I. RECORDING ISSUES

RECORDING ISSUE 1: SHOULD THE ICA PROVIDE THAT WHEN LEVEL 3 IS THE RECORDING COMPANY, IT WILL PROVIDE USAGE DETAIL ACCORDING TO MECAB STANDARDS?

ICA Reference: Appendix Recording § 3.13

SBC proposes, and Level 3 opposes, the following language for Section 3.13 of the Recording Appendix:

> ***When LEVEL 3 is the Recording Company, LEVEL 3 will provide its recorded billable messages detail and access usage record detail data to SBC-13 STATE under the terms and conditions of this Appendix.***

The "terms and conditions of this Appendix" to which Section 3.13 refers require recorded billable message detail to be provided as set forth in the Multiple Exchange Carrier Access Billing ("MECAB") document. SBC Ex. 11.0 (Smith Direct) at 4. The reason for this

requirement is that MECAB is the format that has historically been used and that is used today for access records that are exchanged between ILECs and IXCs. *Id*. Thus, the question presented by this issue is simply whether Level 3 should be required to use the industry standard format. Level 3 should be required to do so.

Even Level 3 acknowledges that MECAB "is the format used historically for access records that are exchanged between ILECs and IXCs." Level 3 Ex. 2.0 (Wilson Direct) at 37. And indeed, Level 3 is not proposing the use of any particular other format. Instead, Level 3 suggests that in light of anticipated reforms to the access charge system, the parties should "include language that permits them to discuss mutually agreeable ways of exchanging the same data, but in formats or by means that might make more sense once these reforms take effect." *Id*. at 37. What Level 3 means by "language that permits them to discuss" that matter, however, is unclear; Level 3 has proposed no language on this issue. Furthermore, there is no need for the parties' agreement to include language that permits them to discuss anything. If the parties want to discuss using a different format, they are always free to do so, and if circumstances arise that persuade both parties to agree to use a specific different format, they can so agree. As SBC's witness testified, SBC is always open to reasonable discussion, and, by definition, is always open to a "mutually agreeable alternative." SBC Ex. 11.0 (Smith Direct) at 5. But at least for now, the interconnection agreement should provide for the parties to use what Level 3 acknowledges is, as of today, the industry standard format.

RECORDING ISSUE 2: SHOULD THE ICA REQUIRE LEVEL 3 TO PROVIDE ACCESS USAGE RECORDS IN ACCORDANCE WITH MECAB STANDARDS IN ALL INSTANCES, OR SHOULD IT PROVIDE FOR THE USE OF ALTERNATIVES IN SOME CIRCUMSTANCES?

ICA Reference: Appendix Recording § 4.1

Like Recording Issue 1, Recording Issue 2 presents the question whether Level 3 will be required to adhere to industry standard formats and protocols for providing usage information. As on Issue 1, the answer is it should.

Access Usage Records ("AUR") is the industry standard format for providing usage measurement information used to bill IXCs. Further, as SBC's witness explained, as part of the industry standard formats, companies use certain protocols that are necessary to ensure that each company's network and systems can correctly read and interpret the usage information. SBC's current method of operating is basic and inherent to the subsystems and infrastructure utilized to support these types of recordings. In other words, SBC has already applied standard procedures to the exchange of data and corresponding records. SBC Ex. 11.0 (Smith Direct) at 7. SBC should not be required to develop new standards or unique processes for Level 3 alone.

Level 3 claims it is asking only "to leave open the possibility of utilizing a mutually agreeable alternative format." Level 3 Ex. 2.0 (Wilson Direct) at 39. That is not, however, what Level 3's proposed language says. And to the extent that Level 3 wants to leave open the possibility of using a mutually agreeable alternative format, there is no need for the contract to say so: By definition, if an alternative format is "mutually agreeable," SBC will agree to it – the parties are always free to mutually agree to depart from what their contract says.

As matters stand today, however, SBC could not accept a format other than AUR, and it would not be appropriate for the Commission to require SBC to do so. The imposition of a different method, especially one that would apply to only one CLEC, would impose an undue

burden and costs on SBC when a proven method currently exists. SBC Ex. 11.0 (Smith Direct) at 8. Again, though, if circumstances change and another format becomes "mutually agreeable" (Level 3's words), the parties can agree to it, and they do not need contract language to give them permission.

J. SS7 ISSUE

SS7 ISSUE 1: SHOULD THE PARTIES COMPENSATE EACH OTHER FOR SIGNALING SYSTEM SEVEN (SS7) QUAD LINKS FOR IXC CALLS AT ACCESS RATES OR ON A BILL AND KEEP BASIS?

ICA Reference: Appendix SS7, § 2.1.1.

This issue concerns SS7 quad links, so we begin by explaining what they are. The SS7 (signaling system 7) network is a data overlay network that is used for two principal purposes: (i) call set-up and routing, and (ii) accessing call-related databases such as the 800 database, the calling name database, and the database that contains line information for calling card number queries. The SS7 network uses SS7 links, SS7 Signal Transfer Points (which are the SS7 equivalent of switches) and SS7 information databases to perform its functions. It is separate from the Public Switched Telephone Network that actually carries end user voice-grade traffic. SS7 quad links – the subject of this issue – are sets of data links that would be used to connect SBC's SS7 network with Level 3's SS7 network if Level 3 were to deploy an SS7 network. SBC Ex. 8.0 (Novack Direct) at 4.

The parties have agreed, in Section 2.1 of the Appendix SS7, that

> Either party may choose to provide its own SS7 signaling for its facility-based services, or to the extent available, it may purchase SS7 signaling from the other party under the terms and conditions of that party's tariff offering. Alternatively, either party may choose to obtain SS7 signaling from a third-party provider.

That language is followed by Section 2.1.1, which addresses the situation where Level 3 exercises its right to act as its own SS7 service provider. Section 2.1.1 begins with agreed language that states:

> In the event that Level 3 chooses to act as its own SS7 service provider, the parties will effectuate a Bill and Keep arrangement and shall share the cost of the SS7 quad links in each LATA between their STPs;

Then, each party proposes a proviso that would follow that language, and the disagreement lies in the competing provisos. SBC proposes:

> ***provided, however, that said Bill and Keep arrangement and use of SS7 quad links apply to Level 3 CLEC calls and not to calls that are subject to traditional access compensation as found between a long distance carrier and a local exchange carrier, including Level 3 acting as a long distance carrier.***

Level 3, on the other hand, proposes:

> **provided, however, that said Bill and Keep arrangement for signaling messages and cost sharing arrangement for the use of SS7 quad links apply only to each party's CLEC calls and not to calls that are subject to traditional access compensation such as when either party acts as an IXC and the other as a local exchange carrier. To the extent that either party uses SS7 quad links for IXC calls, each will pay the other for such quad links at access rates on a prorated basis in proportion to the amount of IXC calls signaled over such quad links and signaling messages are compensated per the other party's applicable access tariff.**

The fundamental difference between the parties' proposals is this: SBC's language provides that the "***use of SS7 quad links***" applies only to Level 3 CLEC calls, and not to calls that are subject to traditional access compensation, while Level 3's language provides that the "**cost sharing arrangement for the use of SS7 quad links"** applies only to Level 3 CLEC calls, and not to calls that are subject to traditional access compensation. The difference between the two may at first blush appear to be minor, but it is actually enormous. SBC is saying that the

only Level 3 calls that can use the SS7 quad links that are referenced in Section 2.1.1 are Level 3's CLEC calls. In other words, Level 3 (and SBC as well) cannot use these quad links for calls that are subject to traditional access compensation. Level 3's language, on the other hand, would allow Level 3 (and SBC) to use the quad links for *both* kinds of calls, but would require one billing treatment for Level 3's CLEC calls (bill and keep), and a different billing treatment for calls subject to traditional access compensation. Compensation for those calls, under Level 3's proposal, would be governed by the last sentence of Level 3's proposed language. That sentence provides that to the extent the quad links are used for access calls, the parties would compensate each other for the use of the quad links for those calls "at access rates on a prorated basis." For example, if 25% of the traffic that Level 3 sent over the quad links was access traffic and the other 75% was Level 3 CLEC traffic, then 75% of Level 3's usage of the quad links would be bill and keep (no charge), while the other 25% would be subject to access rates.

To recapitulate: The parties have agreed that if Level 3 becomes its own SS7 service provider, the parties will exchange SS7 signaling messages on a bill and keep basis, and will also share the cost of the quad links they use to exchange those messages. SBC proposes that in that scenario, the parties will *not* use the quad links for access-type traffic (including long distance Internet Protocol ("LDIP") traffic). Level 3's language, in contrast, would allow the parties to use the quad links for SS7 messaging for access-type traffic, and would require that in that event, the parties would segregate and bill for the messaging for that traffic at access rates.

There are three reasons that the Commission should adopt SBC's language and reject Level 3's. First, Level 3 presented no testimony on this issue.

Second, the arrangements contemplated by Section 2.1 of the SS7 Appendix, including Section 2.1.1 are, by definition, for the traffic that is within the scope of SBC's obligations under the Telecommunications Act of 1996, not for access traffic. This interconnection agreement under the 1996 Act, in other words, cannot properly be used to impose obligations on SBC concerning access traffic.

SBC has separate and distinct legal obligations regarding what it must make available, and the manner of connection that it is required to provide, to Level 3 as a CLEC versus Level 3 acting as, in essence, an IXC carrying LD IP calls. The interconnection agreement that is the subject of this proceeding pertains to Level 3 as a CLEC, and it governs the interconnection of the parties' networks pursuant to Section 251 of the 1996 Act. Thus, for example, when the parties say, in the agreed language of Section 2.1, that either party may choose to provide its own SS7 signaling or may purchase SS7 signaling from another party, they are saying that to each other in their capacity as carriers who are interconnecting their networks pursuant to Section 251 – Level 3 as the CLEC and SBC as the ILEC. Similarly, when the parties say, in the agreed language of Section 2.1, that if Level 3 chooses to act as its own SS7 service provider, the parties will exchange traffic on a bill and keep basis and share the cost of quad links, they are saying that to each other in their capacities as CLEC and ILEC. Consistent with that, SBC's language appropriately requires the parties to deal elsewhere with the exchange of SS7 messages associated with traffic that they are not exchanging in that capacity.

The third reason for resolving this issue in favor of SBC is that Level 3's language would require SBC's billing systems to segregate the SS7 messaging of Level 3's CLEC calls from the SS7 messaging of Level 3's long distance IP calls, so that SBC could charge a percentage of the total SS7 messaging costs at the rates that apply to CLEC compensation under this ICA, and

charge the remaining percentage of LD IP calls at access rates. But SBC's billing systems cannot do that. When SBC developed its SS7 services, it did not anticipate, and had no reason to anticipate, a need to distinguish and bill for SS7 messaging over the same links that are used for both local and access traffic. SBC Ex. 8.0 (Novack Direct) at 5-7. As a result, SBC's standard billing procedures for its SS7 signaling services are not equipped to segregate and separately bill for SS7 messaging associated with access traffic. Level 3's proposed language would require SBC to develop and implement new, highly manual billing processes for the "prorated" portion of the calls. SBC Ex. 2.0 (Chapman Direct) at 12-13. Level 3 submitted no testimony on this point (or any aspect of SS7 Issue 1), and did not rebut or refute in any way SBC's showing that its billing systems cannot do what Level 3's proposal would require of them.

For both of the foregoing reasons, the Commission should adopt SBC's language and reject Level 3's. But even if the Commission were to reject SBC's language prohibiting the commingling of traffic on the quad links, the Commission nonetheless should not accept Level 3's proposal, because, again, SBC cannot separate and pro rate the messages as Level 3's proposal would require. Consequently, if the Commission were to allow the commingling of traffic on the quad links in the situation we are discussing – which is should not – then the Commission would need to make clear that *all* the messages flowing across those links must be exchanged at access rates.

This Commission sustained precisely the position that SBC is taking here when it rejected an AT&T request to "improperly extend" an ICC decision concerning local SS7 traffic "to include access SS7 traffic." In its decision, the Commission, recognizing that it would not be possible for the parties to segregate and measure SS7 messages for access traffic as opposed to SS7 messages for local traffic if both types were sent over the same link, approved SBC's

language that required AT&T to separate the two types of traffic and send them over "different links." As the Commission explained,

> Access traffic is exchanged between SBC and AT&T pursuant to the parties' access tariffs. AT&T purchased the existing D-links and established the existing interconnection arrangements between the parties' SS7 networks in 1992, prior to there being local service competition. AT&T has not entered into an agreement with SBC to exchange local SS7 messages.
>
> The parties both agree that it is not possible to measure the different types of traffic when it is sent over the same link. [The o]ne possible solution . . . was not advocated by either party. Moreover, it would impact the parties' access arrangements . . . .
>
> SBC's proposed language provides a method by which all traffic can be measured. When AT&T separates local and access traffic onto different links it will be able to accurately bill SBC for access traffic and accurately "bill and keep" SBC for its local traffic. . . .
>
> Accordingly, the Commission adopts SBC's language.

Clarifying Order, ICC Docket 03-0239 (Oct. 20, 2003).

K. <u>UNBUNDLED NETWORK ELEMENT ISSUE</u>

UNE ISSUE 1: **WHICH PARTY'S UNE PROPOSAL MOST APPROPRIATELY REFLECTS THE CURRENT STATUS OF FEDERAL UNBUNDLING LAW AS DEFINED BY *USTA II* AND THE FCC'S *TRIENNIAL REVIEW ORDER*? TO THE EXTENT IT IS DEEMED RELEVANT, WHICH PARTY'S PROPOSAL BEST EFFECTUATES AND ADHERES TO THE FCC'S *INTERIM ORDER*?**

ICA Reference: Entire UNE Appendix

Under Section 251(c)(3) of the 1996 Act (47 U.S.C. § 251(c)(3)), incumbent LECs can be required to "unbundle" (*i.e.*, offer at a separate, TELRIC-based price) certain network elements for CLECs. Section 251(c)(3) does not specify which network elements must be unbundled. Rather, the FCC decides which network elements must be unbundled by applying the requirements of Section 251(d)(2) of the Act, known as the "necessary" and "impair"

requirements, and the goals of the Act. The terms and conditions on which incumbent LECs provide such unbundled network elements ("UNEs") are established in interconnection agreements. 47 U.S.C. §§ 251(c)(3) & 252.

The FCC has tried three times to establish national unbundling rules. Its first two attempts – in the 1996 *Local Competition Order* and the 1999 *UNE Remand Order* – were vacated by the courts for misapplying the "impair" requirement of Section 251(d)(2) and imposing overbroad unbundling duties on the incumbents.[90] The FCC's third attempt came in the *Triennial Review Order* ("*TRO*") in August 2003.[91] In the *TRO*, the FCC attempted to apply more rigorous limitations on unbundling, consistent with the prior court decisions, and therefore found that many network elements that it previously had required to be unbundled did not meet the 1996 Act's standards for unbundling. These rulings generally applied to specific elements (*e.g.*, OCn-level dedicated transport, entrance facilities, and feeder subloops, *TRO*, ¶¶ 253-54, 365-67, 389) or to elements when used for specific purposes (*e.g.*, circuit switching to serve "enterprise market" customers, *TRO*, ¶ 419). The FCC also required unbundling of some elements and left other unbundling decisions – for high-capacity loops and dedicated transport and for mass-market switching – to state commissions. On appeal of the *TRO*, the D.C. Circuit upheld the FCC's decisions where unbundling was not required, but reversed and vacated many of the rulings that required unbundling or left unbundling decisions to state commissions. *United*

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[90] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (rel. Aug. 8, 1996) ("*Local Competition Order*"), *reversed and vacated in relevant part by AT&T Corp. v. FCC*, 525 U.S. 366, 388-92 (1999); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 (rel. Nov. 5, 1999) ("*UNE Remand Order*"), *reversed and vacated in relevant part by United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422-29 (D.C. Cir. 2002) ("*USTA I*").

[91] Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16,978, corrected by Errata, 18 FCC Rcd. 19,020 (rel. Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history discussed in text).

States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

The FCC is now in the process of creating new unbundling rules in light of *USTA II*, and has plans to issue those rules by the end of 2004. *See Interim Order*, ¶¶ 20-21.[92] At present, however, the nationally binding law of unbundling is determined by the FCC's *TRO*, to the extent it is still in place, and by the D.C. Circuit's vacatur of various requirements of the *TRO* in *USTA II*.

The two proposals before the Commission are straightforward: Level 3 seeks to use the old Appendix UNE from the parties' prior interconnection agreement, which pre-dates the *TRO* and *USTA II*, while SBC proposes a new Appendix UNE that tracks the current federal unbundling requirements after the *TRO* and *USTA II* and that is readily adaptable to any new unbundling rules the FCC may issue in the future. Specifically, SBC's Appendix UNE requires unbundling of network elements to the extent such unbundling is still required under the *TRO* and after *USTA II*, but does not require any additional unbundling of elements that are either not required to be unbundled under the *TRO* or as to which *USTA II* vacated any rule that required unbundling. For example, SBC's language requires unbundling of 2-wire and 4-wire copper loops, NIDS, some subloops, and OSS (SBC Appendix UNE, §§ 7-9, 17) but does not require unbundling of enterprise-market switching, entrance facilities, or OCn loops (thus tracking the *TRO*, ¶¶ 315, 365-67, 419) or of mass-market switching or DS1/DS3/dark fiber loops or dedicated transport (thus reflecting the vacatur of the relevant unbundling rules by *USTA II*, 359 F.3d at 565-71, 573-75). *See* SBC Appendix UNE §§ 8.3.4, 8.5.5, 9.4.4, 11-14.

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[92] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("*Interim Order*").

By contrast, Level 3's proposal to re-use the outdated UNE provisions from the prior agreement should be rejected as a matter of law. Although SBC and Level 3 spent several months negotiating based on SBC's proposed Appendix UNE, Level 3 changed its position dramatically after the FCC issued its *Interim Order*. In that order, the FCC required incumbent LECs to continue providing, to the extent required by interconnection agreements as of June 15, 2004, (1) unbundled switching to serve mass-market customers; (2) unbundled enterprise-market loops; and (3) unbundled dedicated transport. *Interim Order*, ¶¶ 1, 21. These requirements will expire when the FCC's new unbundling rules taking effect or on March 13, 2005 (six months from Federal Register publication of the *Interim Order*), whichever comes first. *Id.* Most importantly for this case, the FCC expressly stated that the interim requirements are *not* to be included in any new interconnection agreements entered into after June 15, 2004. *Id*., ¶ 23.

Despite this statement, Level 3 contends that the *Interim Order* authorizes the Commission to adopt the Appendix UNE from the prior SBC-Level 3 interconnection agreement. Level 3 also attempts to rely on Section 271 of the 1996 Act to support that proposal. These arguments fail.

First, the *Interim Order* expressly states that its interim requirements are *not* to be made part of new interconnection agreements, like the one at issue here. The FCC imposed this limitation in order to prevent CLECs from using the *Interim Order* to perpetuate unbundling requirements that were vacated by *USTA II*. *Id*. As the FCC explained, "if the vacated rules were still in place [or reinstated], competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. *The interim approach adopted here, in contrast, does not enable competing carriers to do either*." *Id.* (emphasis added). The FCC emphasized that this was the "[m]ost significant[]" limitation on the

scope of the *Interim Order*, for it "forecloses the implementation and propagation of the vacated rules" in new interconnection agreements. *Id.* If that were not enough, the FCC also defended the *Interim Order* to the D.C. Circuit by explaining that the order "made clear that its interim rules would not permit CLECs to obtain new contracts under the vacated rules, as the CLECs would have done if the agency had reinstated those rules."[93] Level 3, however, seeks to do exactly what the FCC "foreclose[d]" and does "not permit." *See also* Staff Ex. 1.0 (Zolnierek) at 22-23 ("FCC rules do not currently require SBC to provide [mass market switching, enterprise market loop and dedicated transport] as Section 251 UNEs.")[94]

Second, even if the requirements of the *Interim Order* could be included in new interconnection agreements (though they cannot), those requirements apply only to the three network elements specified in the *Interim Order*, whereas Level 3's contract language would appear to require unbundling of several network elements that are not covered by the *Interim Order*, such as enterprise-market switching, entrance facilities, feeder subloops, and SS7 signaling and call-related databases independent of unbundled switching. *Compare* Level 3 UNE Appendix, §§ 9, 10.3.1, 8.1.2, and 12 *with TRO*, ¶ 419 (no requirement to unbundle enterprise switching), ¶¶ 365-67 (no requirement to unbundle entrance facilities), ¶¶ 253-54 (no requirement to unbundle feeder subloops), and ¶ 544 (no requirement to unbundle SS7 signaling or call-related databases independent of switching); *see also* Staff Ex. 1.0 (Zolnierek) at 22-23 (the *Interim Order* "concerns only a subset of all Section 251 UNEs"). It is well settled that the purpose of arbitrations under Section 252 of the 1996 Act is to implement the unbundling

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[93] Opposition of Respondents [FCC] to Petition for a Writ of Mandamus, at 2, *United States Telecom Ass'n v. FCC,* No. 00-0012 (D.C. Cir., filed Sept. 16, 2004).

[94] Staff witness Zolnierek addressed the UNE issue at pages 22-24 of his testimony but did not make a specific recommendation on how to resolve the issue.

requirements of Section 251 as reflected in valid FCC rules and orders (47 U.S.C. §§ 252(c)(1) & (e)(2)(B)), yet Level 3 seeks unbundling requirements that are not supported by any current law.

Third, although the requirements of the *Interim Order* will expire no later than March 13, 2005, Level 3's proposed contract does not contain any such expiration date. Rather, under Level 3's proposal numerous pre-*TRO* and pre-*USTA II* unbundling requirements would be locked in place until SBC endures the expense and delay of a dispute resolution process to remove unbundling requirements from the ICA that, under current law, should never have been there in the first place. The specific expiration dates in the *Interim Order* are there to prevent such a result. *See* Staff Ex. 1.0 (Zolnierek) at 24 (duration of the *Interim Order*'s requirements "is finite").

Fourth, SBC's "Interim Order Rider," attached to Mr. Silver's testimony, already offers Level 3 everything that it conceivably could be entitled to under the *Interim Order*, yet Level 3 has rejected that Rider. The only explanation for that refusal is that Level 3 seeks to extend the *Interim Order*'s very limited requirements both (1) to network elements that are not covered by the *Interim Order*, and (2) well beyond the FCC-established expiration date for the *Interim Order*'s requirements.

Finally, Level 3's reliance on Section 271 is misplaced. This arbitration is being conducted under Sections 251 and 252. Whatever requirements may exist under Section 271, they are separate and apart from the requirements of Section 251 and are not enforceable or arbitrable here. *See* 47 U.S.C. § 252((c)(1) (purpose of arbitration is to ensure that the requirements of Section 251 and FCC rules implementing Section 251 are met); *id.*, § 252(e)(2)(B) (same for approval of agreement). Moreover, Section 271 confers no authority

upon state commissions. Rather, Section 271 makes clear that the FCC, and *only* the FCC, has authority under Section 271 to enforce that provision. A Section 271 application is submitted *to the FCC* (47 U.S.C. § 271(d)(1)), and approval is granted *by the FCC* (*id.* § 271(d)(3)). During the application process, Section 271 does not set forth *any* state commission role or authority other than as a consultant to the FCC. *Id.* § 271(d)(2)(B). 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). Once an application is approved – as SBC Illinois' application has been approved[95] – Section 271 provides authority *only to the FCC* to enforce continued BOC compliance with the conditions for approval. 47 U.S.C. § 271(d)(6). There is no provision in Section 271 providing any role to state commissions – not even a consultative role – with respect to the ongoing obligations of the BOCs once they have received approval.[96]

* * *

In short, SBC's proposed Appendix UNE is the only legitimate proposal before the Commission and should be adopted in full unless new FCC rules take effect before an arbitration decision or before approval of a final agreement. In either of those cases, SBC's Appendix UNE should be approved except to the extent that it needs to be modified to reflect the FCC's new unbundling rules.

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[95] Memorandum Opinion and Order, *Application by SBC Comms. Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, 18 FCC Rcd. 21,543 (rel. Oct. 15, 2003).

[96] Level 3's UNE testimony also referred to the *SBC/Ameritech Merger Order* and state law as supporting its UNE proposal. In other states, however, Level 3 has abandoned those theories at the briefing stage. SBC assumes Level 3 will do the same here, though it naturally will reply to any arguments Level 3 may make in its brief here.

III. CONCLUSION

For the foregoing reasons, SBC Illinois respectfully urges the Commission to resolve the arbitration issues in favor of SBC Illinois.

Respectfully submitted,

ILLINOIS BELL TELEPHONE
COMPANY d/b/a SBC ILLINOIS

By: _____
One of its Attorneys

Mark R. Ortlieb
Karl B. Anderson
SBC ILLINOIS
225 West Randolph Street
Floor 25D
Chicago, IL 60606
(312) 727-2415
(312) 727-2928
mo2753@sbc.com
ka1873@sbc.com

Theodore A. Livingston
Dennis G. Friedman
MAYER, BROWN, ROWE & MAW, LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600
tlivingston@mayerbrown.com
dfriedman@mayerbrown.com

Dated: November 12, 2004

CERTIFICATE OF SERVICE

I, Mark R. Ortlieb, an attorney, hereby certify that I caused a copy of the foregoing **SBC ILLINOIS' INITIAL POST-HEARING BRIEF** to be served on the following parties via email on the 12th day of November, 2004.

_____

Mark R. Ortlieb

SERVICE LIST
DOCKET NO. 04-0428

Karl B. Anderson
Corporate/Legal
Illinois Bell Telephone Company
225 West Randolph, Floor 25D
Chicago, IL 60606
E-Mail: ka1873@sbc.com

Erik J. Cecil
Level 3 Communications, L.L.C.
1025 Eldorado Blvd.
Broomfield, CO 80021
E-Mail:
erik.cecil@level3.com

Joseph E. Donovan
Atty. for Level 3 Communications, L.L.C.
Kelley Drye & Warren LLP
333 W. Wacker Dr., Ste. 2600
Chicago, IL 60606
E-Mail:
jdonovan@kelleydrye.com

Dennis G. Friedman
Atty. for Illinois Bell Telephone Company
Mayer Brown Rowe & Maw LLP
190 S. LaSalle St.
Chicago, IL 60603-3441
E-Mail:
dfriedman@mayerbrown.com

Matthew L. Harvey
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601-3104
E-Mail:
mharvey@icc.state.il.us

Henry T. Kelly
Atty. for Level 3 Communications, L.L.C.
Kelley Drye & Warren LLP
333 W. Wacker Dr., Ste. 2600
Chicago, IL 60606
E-Mail:
hkelly@kelleydrye.com

Michael J. Lannon
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601
E-Mail:
mlannon@icc.state.il.us

Theodore A. Livingston
Atty. for Illinois Bell Telephone Company
Mayer, Brown, Rowe & Maw LLP
190 S. LaSalle St.
Chicago, IL 60603
E-Mail:
tlivingston@mayerbrown.com

Eric M. Madiar
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601-3104

E-Mail:
emadiar@icc.state.il.us

Mark Ortlieb
Illinois Bell Telephone Company
25D
225 W. Randolph
Chicago, IL 60606
E-Mail: mo2753@sbc.com

Richard E. Thayer
Director
Level 3 Communications, L.L.C.
1025 Eldorado Blvd.
Broomfield, CO 80021
E-Mail:
rick.thayer@level3.com

James Zolnierek
Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
E-Mail:
jzolnier@icc.state.il.us