

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

**STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
REPLY BRIEF**

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**STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
INITIAL BRIEF**

The Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, and pursuant to Section 761.400 of the Commission’s Rules of Practice (83 Ill. Adm. Code 761.400), respectfully submits its Initial Brief in the above-captioned matter.

I. OPEN ISSUES ADDRESSED BY STAFF

GT&C Issues 6 & 7

GT&C Issues 6 and 7 address the issue of disconnection of services for nonpayment of undisputed charges between the parties. As Staff noted in its Initial Brief, according to both Level 3 and SBC, the issue in GT&C 6, as enumerated in Section 8.8.1 of the Agreement, is under what circumstances may SBC disconnect services for nonpayment. Staff IB, at 5-6. Also, Issue GT&C 7, as enumerated in Section 9.2 of the Agreement, contains a more detailed description of what products and services could be disconnected under the Agreement for Level 3’s failure to pay undisputed charges. In essence, in the event that Level 3 fails to pay its bills, what

process and procedure should SBC undertake to disconnect services it offers to Level 3, and what products and services could SBC disconnect? *Id.* The Staff has taken no position on Level 3's proposal to add the phrase "and otherwise set forth in applicable law" to GTC Appendix Section 8.8.1.

Regarding the issue of whether Section 9.2 should contain language stating that a failure to pay undisputed bills "shall be" grounds for disconnection or "may be" grounds for disconnection, the Staff agrees with SBC that the phrase "shall be" grounds for disconnection should be included in Section 9.2 in order to offer both parties certainty on the consequences of undisputed charges. Staff Ex. 2.0 (Omoniyi), at 14. Level 3 did not take a position on the "shall be" versus "may be" grounds for disconnection in its Initial Brief.

The Staff agrees with Level 3 on the issue of what services should be discontinued if Level 3 does not pay an undisputed, and properly billed amount. Level 3 argues that only the services that are neither paid nor disputed should be subject to disconnection. Level 3 IB, at 169-70. SBC, on the other hand, argues that all services it provides to Level 3 should be subject to disconnection if Level 3 fails to pay undisputed billed amounts for any single service. SBC IB, at 42-45.

In replying to Mr. Omoniyi's conclusion that the Commission should permit SBC to discontinue only the services that are unpaid to avoid confusion between the carriers and, in the worst case, impact end-user customers (Staff Ex. 2.0 (Omoniyi), at 13), SBC replies that

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. . [sic] 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.

SBC IB, at 43-44 (emphasis added).

SBC appears to acknowledge that there would in fact be confusion, which would require “*extensive* communication between SBC and Level 3, above and beyond that which is expressly required by the interconnection agreement.” *Id.*, (emphasis added). The Staff, consequently, continues to recommend that the Commission adopt its recommendation that only the services that Level 3 has not paid for will be eligible for termination, which would clarify what services are at risk from the beginning. Staff presumes that this will also save the parties the time and expense of engaging in the noted extensive communications above and beyond what is required by the ICA. Under the Staff's proposal there would be no need for communications beyond what is required under the ICA.

Even after such extensive communications, moreover, Level 3 would still have no knowledge just which services it purchases from SBC are in danger of being discontinued. SBC merely promises that it “would make very clear exactly what services it actually *had in mind* disconnecting if Level3 failed to pay.” SBC IB, at 44 (emphasis added). Of course, whatever services SBC “had in mind disconnecting” when engaging in such extensive communications, SBC is presumably free to change its mind regarding what it “had in mind disconnecting” when it actually came time to disconnecting services. Even if SBC were to communicate specifically which services

were subject to disconnection at the time of the dispute, it would be unfair to Level 3 not to know in advance of a payment dispute which services would be subject to disconnection, particularly if those services are unilaterally chosen by SBC at that time rather than by prior agreement.

Thus, SBC's proposal, based upon SBC's argument contained in its Initial Brief in support of its proposal, appears to offer more confusion than the Staff had at first anticipated. If the Commission, however, adopts the Staff's proposal there will be no confusion regarding what services are in danger of being discontinued because only the services that Level 3 has not paid for will be eligible for potential discontinuation. SBC's proposal could allow large-scale and generalized disconnection of service, which could affect both paid and unpaid services of Level 3. Staff Ex. 2.0 (Omoniyi), at 14. The Staff, consequently, continues to recommend that disconnection be specific and limited to the products and services for which Level 3 has not paid and has not disputed the charges. *Id.*, at 15.

Issues PC-1 and VC-1

The issues in both PC-1 (Terms and Conditions Governing Physical Collocation) and VC-1 (Terms and Conditions Governing Virtual Collocation) are identical. According to the parties, the issue is whether the relevant Physical Collocation Appendix and Virtual Collocation Appendices should comprise the sole and exclusive terms and conditions governing physical and virtual collocation, respectively; or whether Level 3 should be permitted to order collocation products and services both from the relevant Appendix and from the existing state tariff. Staff IB, at 8. In essence, should

Level 3 be allowed, “to ‘pick and choose’ rates, terms and conditions from either its interconnection agreement with SBC, or from a state tariffs”? *Id.*

As Staff understands Level 3’s proposal, it would entitle Level 3 to take services under its interconnection agreement, or from the tariff, at its election. In the context of a provision imposed by arbitration, the Staff finds Level 3’s position irreconcilable with existing law. See Second Report and Order, *Review of the section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 FCC Rcd 13, 494, ¶ 11 (rel. July 13, 2004)(“*Second Report and Order*”).

The Staff agrees with SBC that “the FCC has recently warned that the availability to a CLEC of an alternative set of collocation terms and conditions, apart from its interconnection agreement, would serve as a disincentive to the traditional give-and-take of negotiations.” SBC IB, at 203 *citing Second Report and Order*. SBC, moreover, has agreed to Staff witness’ Omoniyi’s modification 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.” SBC IB, at 206, citing Staff Ex. 2.0 at 20-21.

Issues PC-2 and VC-2

The issue in both PC-2 and VC-2 are identical. The issue is whether Level 3 should be permitted to collocate equipment that SBC has determined is not “necessary for interconnection or access to UNEs” or does not meet minimum safety standards?¹

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

The Staff recommended that SBC's proposals be adopted, with some modifications to address certain Level 3 concerns. Staff Ex. 2.0 (Omoniyi), at 25. One of the Staff's proposed modifications was to require "SBC [] to make its list of equipment that meets its collocation requirements known to Level 3 *as soon as there is* a request for collocation of equipment from Level 3." *Id.*, at 27 (emphasis added). SBC states that it is agreeable to meeting this modification. SBC IB, at 208-09. The language, however, SBC proposes to accommodate Mr. Omoniyi's modification to be deficient in one respect: it fails to require SBC to make available to Level 3 the list of equipment *as soon as there is* a request for collocation. The Staff recommends that the word "Immediately" precede SBC's proposed language. SBC IB, at 209, n. 89.

Level 3 argues that SBC's position is contrary to FCC rules and Orders. Level 3 IB, at 193-194. Level 3's citation to FCC Rules and Orders appear to be a blunt attempt at obfuscating this issue. For instance, Level 3 cites to 47 CFR §51.323(c) for the proposition that if an ILEC objects to collocation of equipment, the ILEC must prove to the Commission that the equipment is not necessary or not safe. *Id.* SBC, however, has not objected to any specific piece of equipment. SBC, consequently, could hardly prove anything to the Commission regarding this yet unidentified piece of equipment. Staff witness Mr. Omoniyi, moreover, noted that Level 3 could employ the dispute resolution provisions of the ICA to bring any such issue to the Commission's attention, if needed (Staff Ex. 2.0 (Omoniyi), at 26-27), or bring a complaint against SBC under the various complaint procedures provided by the PUA.

Likewise, Level 3's attempt to employ the FCC Collocation Order on Remand² is likewise unavailing. Level 3 cites to certain language from ¶¶ 41 and 45 of *FCC Collocation Order on Remand*, both of which address the issue of whether multi-functional equipment is "necessary" for collocation, and attempts to append the FCC's language on this issue, which does not address the rejection of multi-functional equipment. Again, if SBC rejects Level 3 proposed multi-functional equipment for collocation, then Level 3 could employ the dispute resolution provisions of the ICA to bring any such issue to the Commission's attention, if needed, or bring a complaint against SBC under the various complaint procedures provided by the PUA.

Level 3's primary objection appears to be that SBC should not be allowed "to preemptively block the placement of Level 3's collocation equipment in SBC's premises locations, until this Commission determines that the equipment is acceptable for placement in Level 3's collocation space." *Id.*, at 94. SBC's proposal, however, does not "preemptively block the placement" of any specific piece of Level 3 equipment. SBC's proposed language begins with the conditional phrase, "In the event" that Level 3 requests to collocate equipment that does not meet the necessary standard or minimum safety standards. Such conditional language can hardly be characterized as preemptively blocking specific types of Level 3 equipment. Finally, the Staff notes that Level 3 failed to propose any alternative language that could address their seemingly rather vague concerns.

NIM Issue 5

² *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435, ¶41 (Aug. 8, 2001) ("*FCC Collocation Order on Remand*").

Both parties express concern that the language of Appendix NIM, Section 2.5, could be interpreted as governing which traffic is, and which traffic is not, subject to the provisions of Appendix NIM. Level 3 IB at 18; SBC IB at 183.

Level 3 expresses concern that SBC's proposed language could limit Level 3's ability to place certain forms of traffic over local interconnection trunk groups. Level 3 IB at 18-19. A plain reading of SBC's proposed language reveals that Level 3's concerns are unfounded. SBC's proposed language requires the parties to jointly ensure the provision of sufficient facilities for the Local Interconnection Trunk Groups required for the exchange of traffic between them. Level 3 – SBC 13State – DPL – NIM, Issue No. NIM 5. This language does not limit the types of traffic that can be exchanged over Local Interconnection Trunk Groups. For example, if Level 3 prevails and is permitted to pass “non-local” traffic over Local Interconnection Trunk Groups, then this language would require both parties to supply facilities sufficient to exchange both local and non-local traffic over the Local Interconnection Trunk Groups.

Alternatively, SBC expresses concern that Level 3's proposed language could have the effect of assigning SBC financial responsibilities that the interconnection agreement would otherwise assign to Level 3. SBC IB at 182-183. Again, however, a plain reading of Level 3's proposed language reveals that SBC's concerns are unfounded. Level 3's proposed language requires the parties to jointly ensure that sufficient facilities are provided for the Trunk Groups required for the exchange of traffic between them. Level 3 – SBC 13State – DPL – NIM, Issue No. NIM 5. This does not relieve Level 3 of any financial obligations found elsewhere in the contract.

Both parties' proposed language requires them to jointly ensure that sufficient facilities are provided for trunk groups necessary for the exchange of traffic between them. Nothing in either party's proposed language extends the interconnection agreement to trunk groups that are not otherwise included within the provisions of this interconnection agreement. Nor does anything in this proposed language assign financial responsibility for any trunk groups. What remains to be determined then is whether the parties should work cooperatively to ensure that adequate facilities are provided for Local Interconnection Trunk Groups alone, or for all trunk groups falling under the provisions of this contract. Because it is imperative that the parties establish adequate facilities to carry all trunk groups established under the contract, Staff recommends the latter.

For the reasons explained above, Staff recommends the Commission adopt Level 3's proposed language for *Appendix NIM, Section 2.5*.

NIM Issue 7

This issue turns on whether Level 3 should include language in the agreement that would enable it to interconnect using collocation methods permitted under applicable law but neither referenced in the agreement or in state tariffs. SBC 13State – DPL – NIM, Issue No. NIM 7. Level 3 expresses concern that exclusion of its proposed language would allow SBC to deny Level 3 collocation arrangements that it is entitled to under law and that SBC has offered other carriers. Level 3 IB at 22.

Staff agrees with SBC that Level 3's concerns regarding future changes in law are best remedied by the change of law provisions. SBC IB at 187. That is, if there is a

change in law that would require SBC to provide an arrangement that it was not previously required to provide, then Level 3 could obtain that arrangement through the change of law provisions. *Id.*

Level 3's additional concern that other carriers may negotiate agreements with collocation arrangements not included in this agreement or in SBC's tariff should be rejected. Level 3 IB at 22. In essence, Level 3 seeks to obtain the most favorable arrangements offered to any carrier with out regard for the quid pro quos inherent in negotiations. Such proposals defeat the incentives for parties to partake in the negotiation process spelled out in Section 251/252 of the 1996 Act. Wisconsin Bell v. Bie, 340 F.3d 441, 444 (7th Cir. 2003). If there was any particular arrangement that Level 3 is entitled to under existing law and wanted in this agreement then Level 3 should have included that arrangement in its proposed language. Level's attempts to leave the contract open-ended is simply inconsistent with the purpose of this agreement (which is to memorialize the parties specific obligations to one another and the specific limitations to those obligations).

For these reasons, Staff recommends the Commission reject Level 3's proposed language for Appendix NIM, Sections 3.1.1 and 3.1.2.

UNE Issues

Reply to Level 3

Staff recommended, in its Initial Brief, that the Commission direct the parties to either: (1) draft a mutually agreeable UNE Appendix that would become effective upon expiration of the interim period identified in the *Interim UNE Order* ("Interim Period") or

(2) identify specific arbitrable disputes with respect to such a UNE Appendix. This recommendation was premised on the parties' collective failure to adequately identify areas of dispute with respect to UNE issues going forward.

Level 3 opposes any effort to craft a new UNE Appendix, arguing that the Commission should not make any determinations regarding rates, terms, and conditions for UNEs for the period following expiration of the Interim Period. *Level 3 IB at 143.* Level 3 supports its position by arguing that the FCC has prohibited the arbitration of new agreements until permanent rules are adopted. *Level 3 IB at 145.*

Level 3 is incorrect in this assertion. The FCC did not prohibit the negotiation of new agreements that would govern UNE provision after the Interim Period. In fact, the FCC explicitly provided for negotiation of new agreements to govern this period. The FCC stated:

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

Interim UNE Order, ¶ 22 (footnotes omitted).

That is, the FCC expressly preserved SBC's (or for that matter Level 3's) right to conform existing agreements to changes in federal unbundling rules and regulations.

In support of its arguments that no new UNE agreements can be crafted Level 3 refers the Commission to paragraph 17 of the Interim UNE Order (Level IB at 148), which states:

There is credible evidence before us that some incumbents have informed competitive LECs of their intention to initiate proceedings to curtail their UNE offerings, and that at least one BOC has announced its intention to withdraw certain UNE offerings immediately. While such actions are permitted under the court's holding in USTA II, they would likely have the effect of disrupting competitive provision of telecommunications services to millions of customers. Moreover, whether competitors and incumbents would seek resolution of disputes arising from the operation of their change of law clauses here, in federal court, in state court, or at state public utility commissions, and what standards might be used to resolve such disputes, is a matter of speculation. What is certain, however, is that such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible. Therefore, consistent with our statutory mandate to protect the public interest, we adopt the following interim and transition requirements.

Interim UNE Order, ¶ 17.

As this passage indicates, the FCC expressed concern that state Commission arbitration of UNE rates, terms, and conditions based upon its own orders and court decisions, if undertaken absent the transition provisions included in the FCC's *Interim UNE Order*, could disrupt competitive provision of telecommunications service and waste party and/or regulatory resources.

However, the FCC clearly did not consider this an insuperable problem. To alleviate the concerns expressed in paragraph 17, the FCC provided the industry guidelines for conforming contracts to current federal unbundling rules. See *Interim UNE Order*, ¶29. These guidelines permit parties to conform their agreements to changes in federal unbundling rules and yet alleviate the concerns regarding competitive disruption and uncertainty expressed by the FCC. *Id.* As explained above, the FCC explicitly granted parties the ability to proceed with the crafting of UNE agreements under the assumption that ILECs will be relieved of Section 251 obligations

with respect to the elements addressed in the Interim UNE Order if the parties adhere to a transition structure defined in the Interim UNE Order. In particular, the FCC stated:

Transition period: For the six months following the interim period (that is, the six months following the expiration of the interim requirements on the earlier of six months after Federal Register publication of this Order or the effective date of the Commission's final unbundling rules), in the absence of a Commission ruling that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to section 251(c)(3) in any particular case, we propose the following requirements, designed to protect incumbent LECs' interests while also guarding against the precipitous rate increases that might otherwise result. First, in the absence of a Commission ruling that switching is subject to unbundling, an incumbent LEC shall only be required to lease the switching element to a requesting carrier in combination with shared transport and loops (i.e., as a component of the "UNE platform") at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for this combination of elements plus one dollar. Second, in the absence of a Commission ruling that enterprise market loops and/or dedicated transport are subject to section 251(c)(3) unbundling in any particular case, an incumbent LEC shall only be required to lease the element at issue to a requesting carrier at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for that element. With respect to all elements at issue here, this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates. As during the interim period, carriers shall remain free to negotiate alternative arrangements (including rates) superseding our rules (and state public utility commission rates) during the transition period. Subject to the comments requested in response to the above NPRM, we intend to incorporate this second phase of the plan into our final rules.

Post-transition period: After the transition period expires, incumbent LECs shall be required to offer on an unbundled basis only those UNEs set forth in our final unbundling rules, and subject to the terms and conditions set forth therein. The specific process by which those rules shall take effect will be governed by each incumbent LEC's interconnection agreements and the applicable state commission's processes.

Interim UNE Order, ¶29.

These guidelines supply rates, terms, and conditions for inclusion into contracts governing UNE provisioning following the expiration of the Interim Period. If followed, these guidelines assuage the FCC's concerns regarding competitive disruption and uncertainty, and therefore permit the parties to proceed with the crafting of UNE agreements.

Staff notes, that in its Initial Brief, it pointed to an FCC statement made regarding the legal effectiveness (or perhaps ineffectiveness) of the Interim Period transition structure. Staff IB, at 48. However, as the discussion above reveals, the FCC guidelines are effectively a condition imposed on parties that pursue contracts to conform their agreements to existing federal rules and regulations that would relieve the concerns expressed by the FCC regarding the fruitfulness of such pursuits. As such, consistent with the FCC's guidance, Staff recommends that the Commission impose these guidelines on the agreement as it did in another recent arbitration concerning these same issues. *XO Arbitration Decision* at 95-96.

Level 3 further suggests that the FCC has precluded carriers from establishing new UNE agreements. Level 3 IB at 145. The FCC did no such thing. In particular the FCC stated:

Our approach here is, in several meaningful respects, different from a mere reinstatement of our vacated rules. Most significantly, the interim approach forecloses the implementation and propagation of the vacated rules. For various reasons, the vacated rules had generally not yet been translated into contractual agreements. Thus, by freezing in place carriers' obligations as they stood on June 15, 2004, we are in many ways preserving contract terms that predate the vacated rules. Moreover, if the vacated rules were still in place, 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. Further, as

described above, while we require incumbents to continue providing the specified elements at the June 15, 2004 rates, terms and conditions, we do not prohibit incumbents from initiating change of law proceedings that presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport, so long as they reflect the transition regime set forth below, and provided that incumbents continue to comply with our interim approach until the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules. Thus, whatever alterations are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order.

Interim UNE Order, ¶ 13.

As the full passage makes clear the FCC has taken action that would prevent carriers from opting into frozen UNE provisions or forming otherwise new contracts based upon vacated rules. Nothing in this passage or elsewhere in the FCC's order, however, prevents parties with existing UNE agreements from crafting UNE agreements that conform to the FCC's transition structure. In fact, the FCC explicitly preserves all parties rights to do just that.

Therefore, for the above reasons, the Commission should reject Level 3's position that the parties cannot craft UNE rates, terms, and conditions for the post Interim Period.

Level 3 identifies discrete disputes with respect to appropriate rates, terms, and conditions for UNEs following the expiration of the interim period. Level 3 cites SBC's Section 271 obligations as reason to reject SBC's proposed UNE Appendix. Level 3 IB at 158. Level 3 does not, however, specify what UNE rates, terms, or conditions it requests based on Section 271 requirements from SBC that are not included within SBC's proposed UNE Appendix. Furthermore, even had Level 3 identified such rates,

terms and conditions, Congress has delegated enforcement of Section 271 obligations to the FCC. 47 U.S.C. § 271(d)(6)(A). If SBC elects not to comply with its 271 requirements, then the FCC may order it to do so, impose fines for failure to comply, or revoke its in-region interLATA service authority. 47 U.S.C. § 271(d)(6). If Level 3, moreover, believes that SBC has failed to comply with its 271 obligations, by any inclusion or omission of UNE rates, terms, and conditions in its proposed contract, then Level 3 may file a complaint with the FCC. 47 U.S.C. § 271(d)(6)(B).

Similarly, Level 3 cites SBC's state law obligations as reason to reject SBC's proposed UNE Appendix. Level 3 IB at 160. Again, however, Level 3 fails to specify what UNE rates, terms, or conditions it desires, based on SBC state law requirements that are not included within SBC's proposed UNE Appendix. Further, SBC state tariffs provide Level 3 access to many, if not all, of the products and services that SBC is required to offer under state law. Level 3 has failed to provide any evidence that SBC has refused to provide it any particular UNE product or service required by state law but not offered within SBC's state tariffs. Nor has Level 3 provided any evidence that the language in SBC's proposed Appendix UNE would preclude Level 3 from obtaining products or services from SBC that SBC offers because of its state law obligations through its state tariffs. There is no evidence, consequently, to support Level 3's assertion that SBC's proposed UNE Appendix should be rejected based on SBC's non-compliance with state law. In any event, Level 3's concerns can be remedied by requiring the parties to include language that would specify that nothing in this interconnection agreement prohibits Level 3 from ordering products or services, not otherwise provided for in the agreement, from SBC's state tariffs.

Level 3 also contends that its proposal to extend the term of the parties existing interconnection agreement until the FCC determines permanent UNE rules will not require SBC to provide Level 3 network elements identified in the *Interim UNE Order* that are declassified (*i.e.*, that SBC is not required to provide under Section 251(c)(3)). Level 3 IB at 147. However, Level 3 bases its argument on its belief that the *Interim UNE Order* requires SBC to continue to provide the network elements identified in that order until permanent rules are established. *Id.* This is incorrect. As explained above, the FCC established a transition mechanism for use in establishing UNE rates, terms, and conditions following expiration of the Interim Period freeze. Level 3 IB at 144-147. That is, the FCC did not impose an indefinite freeze terminating only upon issuance of permanent rules as Level 3 seems to assert.

Level 3 also errs in its analysis of applicable federal rules pertaining to entrance facilities, dedicated transport, enterprise loops, EELs, and mass market switching. Level 3 correctly notes that the FCC eliminated entrance facility UNEs in the TRO and that the USTA II court remanded the FCC's decision with respect to entrance facilities. Level 3 IB at 152. Level 3 errs, however, in drawing the conclusion that SBC must continue to provide entrance facilities per federal rules and regulations. The USTA II court did not vacate the FCC's decision. Level 3 IB at 152-153. Therefore, as it stands, according to the TRO, SBC is not required to provide entrance facility UNEs under FCC Section 251 unbundling rules and regulations.

Level 3 correctly notes that the USTA II decision vacated FCC impairment decisions with respect to dedicated transport and mass market unbundled switching. Level 3 IB at 153, 157. The FCC also assumed for the purposes of its *Interim UNE*

Order that the USTA II court vacated its impairment decisions with respect to enterprise loops. *Interim UNE Order*, ¶ 1, n. 4. Thus, as it stands now, the FCC has no valid impairment findings with respect to these UNEs and therefore ILECs are not required to provide them per FCC Section 251 unbundling rules. Thus, again Level 3 errs in drawing the conclusion that SBC must continue to provide these network elements per federal rules. Rather, SBC must provide these UNEs to Level 3 only as they were offered by SBC to Level 3 through the parties' effective June 15, 2004, interconnection agreement and only through the Interim Period. Following the Interim Period, SBC's provision under Section 251 is limited to that dictated by the FCC's transition plan.

Regarding EELs, Level 3 correctly identifies an EEL as a combination of loop(s) and dedicated transport UNEs. Level 3 IB at 155, n. 358. Because, as explained above, the FCC has no valid dedicated transport impairment finding, there are no currently effective Section 251 rules requiring the provision of dedicated transport and therefore no currently effective Section 251 rules requiring the provision of EELs. Therefore, Level 3 errs in asserting that SBC is required to provide EELs under current federal law. Level 3 IB at 155-156. Again, subsequent to the Interim Period, SBC's provision under Section 251 is limited to that dictated by the FCC's transition plan.

Reply to SBC

SBC correctly argues that the Commissions decision in this arbitration should be based on valid FCC rules and orders. SBC IB at 16. SBC then argues that if the FCC does not establish permanent rules prior to conclusion of this arbitration, that the Commission must approve SBC's proposed UNE Appendix. SBC IB at 15. SBC's

proposed UNE Appendix does not necessarily, however, comport with current FCC rules and orders.

As explained above in the *Interim UNE Order*, the FCC specifically authorized ILECs to pursue new contracts that reflect the USTA II court's vacation of FCC impairment findings. However, the FCC explicitly stated that any amendments made to agreements to incorporate the USTA findings must reflect the FCC's transitional structure. *Interim UNE Order*, ¶ 22. SBC's proposals do not appear to reflect this transition structure. For example, SBC's proposals do not provide for the continued offering, during the second 6-month transition period, of network elements or network element combinations at the rates, and on the terms and conditions, dictated by the FCC's transitional structure. *Interim UNE Order*, ¶ 29. Thus, to the extent that SBC's contract fails to reflect this transition structure, with respect to UNEs provided for in the existing contract, SBC's proposed contract should, if necessary, be modified to do so.

Modification will not be necessary if Level 3 does not currently provide service using UNEs. The FCC's transitional structure provides for continued provision of service only to customers with existing service provided via UNEs. *Interim UNE Order*, ¶ 29. Thus, if Level 3 does not currently provide service via UNEs, then the transition period requirements become moot, and therefore, unnecessary.

Revised Staff Recommendation

The discrete disputes raised in the initial briefs filed in this proceeding have provided the Staff and the Commission with information (heretofore missing) that is essential to properly resolving UNE Issue 1. Staff, accordingly, now recommends that the Commission resolve this matter in a manner that might obviate the need for the

parties to return to the Commission -- thereby reducing the resources both the parties and the Commission would need to commit to completing this agreement. Based on the arguments presented above, Staff recommends the Commission reject Level 3's proposed UNE Appendix as inconsistent with the Interim UNE Order and instead order the parties to adopt SBC's proposed Rider and UNE Appendix with the following two modifications.

First, the agreement should reflect the transitional mechanism included in the *Interim UNE Order*. *Interim UNE Order*, ¶ 29. The *Interim UNE Order* permits, and in fact encourages, parties to update their agreements to allow a speedy transition in the event that the FCC subsequently declines to unbundle switching, enterprise loops, or dedicated transport in its permanent rules. *Interim UNE Order*, ¶ 12. To this end, the FCC has indicated that the parties can proceed assuming that it will decline to unbundle switching, enterprise loops, or dedicated transport, but that, when the parties do so, the public interest will be served if they include the transition mechanism in their agreement. *Interim UNE Order*, ¶¶ 22, 29. This transition mechanism also serves as a stopgap measure for carriers that currently provide service to customers using UNEs in the event that permanent rules are not issued prior to the expiration of the Interim Period. *Interim UNE Order*, ¶ 2. As noted above, the parties may agree that Level 3 does not currently provide service using UNEs and that this proposed amendment is therefore ineffective. Under such an agreement the parties may simply agree not to include this amendment with out creating any inconsistency with the FCC's directives. This transition mechanism should permit the UNE appendix to be changed pursuant to the change in law provision in the event the permanent rules are different than assumed.

Second the agreement should explicitly indicate that the interconnection agreement does not preclude Level 3 from purchasing goods or services that Level 3 has requested in this proceeding, but that are not provided for in SBC's proposed language, from SBC's state tariffs. Apart from these modifications, Level 3 has offered no compelling evidence that SBC's UNE Appendix should be rejected.

IP – Enabled Traffic Issues

Proper rates, terms, and conditions for the exchange of IP-PSTN traffic give rise – either directly or indirectly -- to numerous issues in this proceeding. The basic positions of the parties with respect to IP-PSTN traffic exchange are polar opposites.

SBC asserts that IP-enabled traffic should be exchanged upon the same rates, terms, and conditions that circuit switched access traffic is exchanged. SBC IB at 26-27. SBC contends that existing FCC rules require the application of switched access charges to IP-PSTN traffic. Id. Regarding interconnection, SBC takes the position that interexchange traffic (including IP-PSTN traffic) is to be routed over access trunks separate and apart from traffic routed over local interconnection trunks, in the manner prescribed by its switched access tariffs. SBC IB at 179.

Level 3, in contrast, takes the position the Commission should specifically decline to order the parties to adopt provisions that would establish the intercarrier compensation rate for IP-enabled traffic. Level 3 IB at 63. However, Level 3 proposes that the Commission bifurcate intercarrier compensation issues from network interconnection issues. Level 3 IB at 25. With respect to interconnection, Level 3 takes the position that the parties should exchange IP-PSTN traffic over local interconnection trunks. Level 3 IB at 25.

Neither party raises any argument that should cause the Commission to resolve the question of proper routing and rating of IP-PSTN, rather than letting the FCC resolve it, as Staff recommends. To resolve these issues, the Commission must determine how existing federal rules apply to the exchange of IP-PSTN traffic. In its recently released *Vonage Preemption Order*, the FCC again established that it is the responsibility and obligation of the FCC - and not state Commissions - to decide whether FCC regulations apply to IP-enabled services. *Memorandum Opinion and Order*, ¶ 1, In the Matter of Vonage Holdings Corporation: Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, FCC No. 04-267, WC Docket No. 03-211 (November 12, 2004) (hereafter “Vonage Preemption Order”). The parties appear to be in agreement that the FCC will do precisely that in connection with Level 3’s *Petition for Forbearance* currently pending before the FCC. SBC IB at 176; Staff Ex. 1.0 at 6.

SBC suggests that the Commission should rule on these issues that would govern any period prior to an FCC determination. SBC IB at 26. The Commission should, however, decline to do so.

First, it is uncertain whether there will even be a period during which the contract is effective, but the FCC has not made a determination on the *Level 3 Forbearance Petition*. The FCC is bound by statute to decide the Level 3 Forbearance Petition by March 22, 2005. *Order*, ¶5, Petition of Level 3 Communications LLC for Forbearance Under 47 U.S.C. § 160(c) from Application of Section 251(g) of the Telecommunications Act of 1934, as Amended, the Exception Clause of Section 51.701(b)(1) of the Commission’s Rules, and section 69.5(b) of the Commission’s Rules, DA 04-3323; WC Docket No. 03-266 (rel. October 21, 2004). Absent unexpected delays, the Commission

is expected to issue its arbitration decision in either late December of 2004 or early January of 2005. Parties are typically provided with time to conform their agreement to the Commission's arbitration. See, e.g., *Arbitration Decision* at 169, AT&T Communications of Illinois, Inc. / TCG Illinois and TCG Chicago: Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996, ICC Docket No. 03-0239 (August 26, 2003) (hereafter "AT&T Arbitration Decision"); *Arbitration Decision* at 97, In the Matter of: Petition for Arbitration of XO Illinois, Inc. of an Amendment to an Interconnection Agreement with SBC Illinois, Inc. Pursuant to Section 252b) of the Communications Act of 1934, as Amended, ICC Docket No. 04-0371 (September 9, 2004) (hereafter "XO Arbitration Decision"). Following submission of the conforming agreement, the Commission has 30 days to approve the agreement prior to it becoming effective by operation of law. 47 U.S.C. § 252(e)(4). Thus, FCC resolution of this issue will occur very near, or even prior to, the date upon which this agreement is approved and/or becomes effective.

Second, if SBC's position on appropriate jurisdictional treatment of such traffic is correct then the Commission need not resolve these issues. That is, SBC contends that IP-PSTN VoIP traffic is expressly subject to the FCC's switched access charge rules. SBC IB at 26. If SBC is correct, then the rates, terms, and conditions for the exchange of such traffic are established through FCC tariffs and the Commission need not determine such rates, terms, or conditions within this proceeding. In fact, SBC contends that: "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.” SBC IB at 155.

Third, neither party has provided any evidence that IP-PSTN traffic will be exchanged between the parties during the period running from when the contract becomes effective to when the FCC makes a determination on the *Level 3 Forbearance Petition*. In fact, what evidence does exist, suggests that, apart from test traffic, no such traffic is being exchanged between the parties. Tr. 272, 297, 480.

The Commission might – arguably - issue at least an interim ruling on these issues, pursuant to the authority remaining from the FCC’s previous IP-enabled service rulings. Vonage Preemption Order, ¶ 44, 155. However, the parties have presented no compelling policy or public interest reason for the Commission to do so. Therefore, given that the FCC has expressed a general intent to preempt the Commission on IP-enabled issues and has identified the issues presented here among those it expects to resolve, the Commission should not exercise its potential discretion here. Vonage Preemption Order, ¶¶32, 44. The parties have provided no evidence that any interim decision the Commission made would, in fact, resolve an interim problem and have not shown why such a decision would not, in light of the FCC’s forthcoming decisions in response to the Level 3’s *Forbearance Petition*, be needlessly disruptive, not to mention a waste of Commission resources. The Staff therefore recommends that the contract specifically identify IP-PSTN as a separate class of traffic that is not at the present subject to any rates, terms, and conditions ordered by the Commission for inclusion either directly or indirectly in the parties’ agreement. Such rates, terms, and condition

can, if appropriate, be added to the contract when the FCC makes its determinations regarding proper rating and routing of this traffic.

IC Issues 10 and 13

In its Initial Brief, Staff recommended the Commission accept Level 3's proposal to exchange Section 251(b)(5) traffic and ISP-bound traffic at a per minute of use rate equal to \$0.0005 rather than at SBC's proposed per minute of use rate equal to \$0.0007. Staff IB at 24-25. However, in its own brief, Level 3 has now, apparently abandoned its previous position. Level 3 IB at 115. Thus, the parties now appear to agree upon a rate of \$0.0007 for the exchange of Section 251(b)(5) and ISP-bound traffic. As such, Staff withdraws its recommendation to accept Level 3's proposed rate of \$0.0005.

Thus, Staff amends its recommendation with respect to Appendix Intercarrier Compensation, Section 6, but only with respect to this rate. Staff now recommends the following language for Section 6:

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

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

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

6.2.1 The rates, terms, conditions in Sections 6.2 through 6.6 ~~6.3~~ apply only to the termination of all Section 251(b)(5) Traffic and all ISP-

~~Bound Traffic as defined in Section 3.2 and Section 3.3 above and is subject to the growth caps and new market restrictions stated in Sections 6.3 and 6.4 below.~~

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

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

~~6.3 ISP-Bound Traffic Growth Cap~~

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

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

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

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

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

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

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

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

~~6.4.1 In the event the Parties have not previously exchanged ISP-Bound Traffic in any one or more LATAs in a particular state prior to April~~

~~18, 2001, Bill and Keep will be the reciprocal compensation arrangement for all ISP-Bound Traffic between the Parties for the remaining term of this Agreement in any such LATAs in that state.~~

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

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

~~6.5.1 Wherever Bill and Keep for ISP-Bound traffic is the traffic termination arrangement between the Parties, both Parties shall segregate the Bill and Keep traffic from other compensable traffic either (a) by excluding the Bill and Keep minutes of use from other compensable minutes of use in the monthly billing invoices, or (b) by any other means mutually agreed upon by the Parties.~~

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

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

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

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

Notably, the only change to Staff’s previous proposal concerns the rate identified in Section 6.2.2.

Transiting Issues

In its Initial Brief, Staff observed that Level 3 accepts the fact that FCC rules do not require SBC to provide transiting. Staff IB at 43. Level 3 has, however, taken the position in its Initial Brief that SBC is required to provide transit service under Section 251 of the Act and, in fact, that Section 251 mandates that SBC do so. Level 3 IB at 128. Level 3 is incorrect in this assertion.

In support of its position, Level 3 asserts that, in its *Virginia Arbitration Order*, the FCC Wireline Competition Bureau “expressly directed parties to include language in the interconnection agreement that includes in a Section 251 agreement that the ILEC must provide transit services to the CLECs”. Level 3 IB at 129. Level 3 therefore contends that: “Accordingly, SBC cannot reasonably assert that Section 251 does not require SBC to provide transit services to Level 3.” Id.

In making this assertion, however, Level 3 takes significant liberties with the Wireline Competition Bureau’s decision. As the *Virginia Arbitration Order* makes clear,

Verizon, the ILEC party to the Virginia proceeding, itself proposed the inclusion of transiting rates, terms, and condition in the contract. *Memorandum Opinion and Order*, ¶ 113, In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, DA 02-1731, CC Docket Nos. 00-218, 00-249, and 00-251 (rel. July 15, 2002) (hereafter “Virginia Arbitration Order”). Indeed, with respect to whether or not an ILEC must provide transiting under Section 251, the *Virginia Arbitration Order* specifically provides:

While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission’s rules implementing section 251(c)(2), **the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.**

Virginia Arbitration Order, ¶ 117 (emphasis added)

Additionally, the *Wireline Competition Bureau* ordered the parties to include transiting language that would, in certain circumstances, deprive AT&T, one of the CLEC parties to the proceeding, of the right to require Verizon to provide transiting service. Virginia Arbitration Order, ¶ 116.

Therefore, the Wireline Competition Bureau did not, as Level 3 urges the Commission to do here, address whether transiting rates, terms, and condition *should* be included in a Section 251 agreement. Level 3’s assertion that it did significantly

misstates the case. The assertion Section 251 *requires* SBC to provide Level 3 transit service is contrary to the Wireline Competition Bureau's Order. Level 3 IB at 130. Level 3 has, to put it charitably, significantly misinterpreted the *Virginia Arbitration Order*.

It is true that the Wireline Competition Bureau determined that permitting Verizon to terminate transit service to a CLEC without adequate notice, and without consideration of a transition mechanism or alternatives available to the CLEC, would be harmful to consumers and would be inconsistent with the fundamental purpose of the Act. Virginia Arbitration Order, ¶ 118. However, these implementation and transition concerns do not rise to the level of a mandate that ILECs provide transiting, especially where the Virginia Arbitration Order expressly *disclaims* any such mandate. Virginia Arbitration Order, ¶117. Even if this were not the case, any such suggestion is belied by the fact that the Wireline Competition Bureau did in fact permit Verizon, under certain circumstances, to deny CLECs transiting service. Id., ¶ 116. It certainly would not, and could not, have done so were the provision of transiting a Section 251 obligation. Level 3's argument must therefore fail.

In its Initial Brief, Staff demonstrated that policy and public interest concerns, such as those raised by the Wireline Competition Bureau, are irrelevant because transiting is available to Level 3 through SBC's state tariffs. Staff IB at 43. The Commission should, however, reject Level 3's further assertion that SBC must provide transiting under Section 251. This assertion is inconsistent with the clear provisions of the *Virginia Arbitration Order*. Virginia Arbitration Order, ¶ 117. It would also be inconsistent with the FCC's explicit statement that: "[t]o date, the Commission's rules have not required incumbent LECs to provide transiting." TRO, ¶ 534, n. 1640. The

Commission should require SBC to provide transit based upon the grounds of sound public policy, rather than the alleged requirements of Section 251.

II. CONCLUSION

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

Respectfully submitted,

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