

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 ILLINOIS' POST-HEARING REPLY BRIEF

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Illinois Bell Telephone Company (“SBC Illinois” or “SBC”) respectfully submits its Post-Hearing Reply Brief. In this brief, we do not address the following issues, all of which either have settled or do not apply in Illinois: GT&C Definitions Issues 6 and 7; IC Issue 19(D); ITR Issues 3, 4, 7, 10, 13, 14, 15, 16 and 17; and NIM Issues 1, 2, 3, 4, 6 and 8.

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

The parties agree SBC is entitled to demand a deposit from Level 3 under certain specified circumstances that would give SBC reason for insecurity about Level 3 paying its bills – such as, for example, a Level 3 failure to timely pay previous bills. Given that agreed premise, it follows naturally that SBC’s entitlement to a deposit should not depend on whether the circumstances arise in Illinois or elsewhere. Thus, for example, if Level 3 fails to timely pay SBC’s bills in Ohio, so that SBC would be entitled to a deposit there, SBC should also be permitted to demand a deposit in Illinois. After all, Level 3’s Ohio delinquency gives SBC as much reason for insecurity about Level 3’s payment of its future bills in Illinois as in Ohio.

Lacking any legitimate response to SBC’s common sense position, Level 3 resorts to obfuscation and misstatement. Perhaps most egregiously, Level 3 contends that its failure to pay

a bill in another state should not trigger a deposit in Illinois because “[t]here may be a pending proceeding in one state that would have an effect on Level 3’s obligation to pay a bill for a particular network element, for instance. If Level 3 disputes that bill for a state-specific reason, SBC should have no claim to disconnect customers in other states for failing to provide SBC with some assurance of payment.” Level 3 Br. at 162. That is a shameful attempt to mislead the Commission. As SBC has repeatedly emphasized (*e.g.*, SBC Ex. 4.0 (Egan Direct) at 9-10), Level 3’s failure to pay a bill does not permit SBC to request a deposit if Level 3 is disputing the bill.¹

In the same vein, Level 3 mischaracterizes SBC’s language as allowing SBC to “penalize Level 3 by requiring deposits in *every* state in which the Parties do business” “in the unlikely event Level 3 purportedly fails to pay a bill in a timely manner.” *Id.* at 161. Apart from the fact that the deposit isn’t a penalty (any more than a security deposit on an apartment is a penalty), SBC’s language has nothing to do with Level 3 “purportedly” doing anything. SBC can obtain a deposit only if Level 3 actually, indisputably fails to timely pay its bill. And if SBC asks for a deposit on the ground that Level 3 “purportedly” missed a payment and Level 3 believes SBC is wrong, Level 3 can refuse the request on that ground.

Level 3 seasons its mischaracterizations with a dollop of scare tactic: “[A] customer in Illinois should not have its service put at risk in the unlikely event that Level 3 finds itself in a situation where it is unable to pay its bills in California.” *Id.* at 162. But this issue is not about putting Level 3’s customers at risk of losing their service. It is about SBC’s ability to obtain an assurance of payment from Level 3 under circumstances that indicate such an assurance is in

¹ The agreed language in GT&C section 7.2.3 allows SBC to request a deposit when Level 3 fails to timely pay a bill “*except such portion of a bill that is subject to a good faith, bona fide dispute.*”

order. Assuming the Commission approves SBC's language, Level 3 will provide a deposit in the "unlikely event" that one is required, and that will be the end of it. No customers are going to lose their service. And how could there possibly be, as Level 3 posits, a situation "where [Level 3] is unable to pay its bills" outside Illinois, but where SBC has no reason to demand assurance that Level 3 will be able to pay its bills in Illinois?

Finally, the FCC's *Verizon Policy Statement* (*id.* at 162) has nothing to do with this issue. It does not say a word about whether or not circumstances that warrant a deposit in one state also warrant a deposit in other states.

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

Agreed language in section 7.2.1 permits SBC to request a deposit if, as of the Effective Date of the ICA, the CLEC "ha[s] not already established satisfactory credit by having made at least twelve (12) consecutive months of timely payments" to SBC "for undisputed charges and/or appropriate escrow payments . . . for disputed charges." Level 3 proposes a modification that would require "more than two [*i.e.*, at least three] valid past due notices" in that twelve-month period before SBC could request assurance of payment based on Level 3's payment history. Level 3 Br. at 163. SBC opposes Level 3's proposed modification on the ground that a CLEC that gets two late payment notices in one year cannot 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. That proposition was attested to (SBC Ex. 4.0 (Egan Direct) at 12) by a person who would know, because he has 14 years experience in the credit area (*id.* at 2).

Level 3 does not contest Mr. Egan's testimony on this point. The Commission must therefore take as true the fact that a CLEC that gets two late payment notices in a year is not sufficiently credit-worthy to be excused from making a deposit. That should resolve this issue,

but Level 3 seeks to avoid the obvious conclusion by mischaracterizing the issue and misusing the purported authority it relies on.

Level 3 mischaracterizes the issue by asserting that Level 3's

proposed language . . . permit[s] carriers that have not yet established a year long business relationship with SBC to not begin the relationship at a disadvantage by having to provide assurances of payment when there exists no indication that the carrier is not a financially stable entity.

Level 3 Br. at 163. Thus, Level 3 creates the impression that its proposed language would spare a new entrant that does not have a one-year payment history with SBC from having to provide a deposit. But that is not the issue, and Level 3's proposed language would have no such effect. The parties have already agreed that the CLEC must post a deposit before it obtains services from SBC unless the CLEC has a full year of good payment history with SBC – the only question is whether, as Level 3's proposed language would have it, that one year of good payment history can include two late payment notices. And, again, SBC's credit expert testified based on 14 years of experience that it cannot, and Level 3 did nothing to rebut or undermine that testimony.

Level 3's reliance on the FCC's *Verizon Policy Statement* (Level 3 Br. at 164) is misplaced. In the first place, the FCC itself has declared that “the Commission's policy statement [which pertained to the provision of interstate access services] has no application to interconnection agreements.” Memorandum Opinion and Order, *Application of SBC Communications Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Michigan*, WC Docket 03-138, 18 F.C.C. Rcd. 19,024 (rel. Sept. 17, 2003), at ¶ 182.

In the second place, Level 3's proposal is inconsistent with the FCC's policy statement in any event. The policy statement says it is appropriate to require a deposit (in the access context) when there is a delinquency “in any two of the most recent twelve months.” See Level 3 Br. at

163-64. Level 3's language, in contrast, would permit a deposit only if the CLEC "has received *more than two* past due notices [*i.e.*, at least three] within the prior twelve months." *Id.* at 163. Thus, Level 3's assertion that "The FCC chose to utilize the same bar Level 3 proposes" (*id.* at 164) is false.

Level 3's proposed language addition for section 7.2.1 should be rejected.

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

Agreed language in section 7.2.2 allows SBC to request a deposit if there is an "impairment of the established credit, financial health or credit worthiness of Level 3," based on information available from recognized financial sources. Level 3 proposes to add that the impairment must be "substantial and material," a qualification that would only muddy the waters and allow Level 3 to defer making a deposit virtually any time SBC asked for one by contending the impairment SBC pointed to was not substantial or material. Level 3 claims that rather than inviting disputes,

Level 3's proposed language provides clarity and a more precise understanding of the level of impairment that will be deemed weighty enough to justify the imposition of assurances of payment.

Level 3 Br. at 165. How clarity and precision would be contributed by the words "substantial and material" remains a mystery to SBC. Furthermore, there is no more accurate and objective measure of substantiality and materiality than the determination of nationally known financial sources that an impairment is worthy of being reported. Thus, section 7.2.2 already has what amounts to a built-in screen for substantiality and materiality, but without the potential for disputes that infects Level 3's proposed language.

The second question presented by GT&C Issue 3 is whether the impairment must occur after the ICA's Effective Date, as Level 3 contends, or not, as SBC contends. Level 3's argument (at p. 166) is conspicuously lame:

Prior to the Effective Date, the Parties have no obligation to each other under the Agreement. It is only after the Agreement takes effect that any changes in Level 3's credit worthiness is of import to SBC and should be considered for purposes of protecting SBC's revenue.

The first of those sentences is true but obviously irrelevant, and the second is relevant but obviously false. If Level 3's credit is acceptable today but turns bad by the time the ICA goes into effect, that development would be of great import to SBC, because it would mean that SBC would in fact need a deposit before providing services to Level 3 under the new agreement, even though it may not seem so today.

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?

This issue presents two separate questions. The first is whether to accept or reject Level 3's proposal to add the word "substantially" to section 7.2.3. Level 3 does not address this question in its brief. Accordingly, the Commission should resolve the question in favor of SBC for the reasons set forth in SBC's initial brief, at 35-36.

The other question is whether the Commission should adopt Level 3's proposed 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 ICA concerning presentation of invoices and dispute resolution. Level 3's brief on this point blithely ignore SBC's position, even though SBC has made that position clear from the outset. SBC has said it agrees with Level 3 that Level 3's

failure to pay or dispute a bill is not a valid ground for a deposit if Level 3's failure was caused by SBC's failure to comply with the ICA's requirements concerning invoicing and dispute resolution. But SBC has also shown that Level 3's language is too broad, because – even if that is not the intent – it would preclude SBC from *ever* requesting a deposit based on Level 3's failure to pay or dispute a bill if SBC *ever* failed to comply with those requirements, even if there were no connection between the two. SBC explained the overbreadth of Level 3's language in its testimony (SBC Ex. 4.0 (Egan), at 20-21), but Level 3 fails to address it. Accordingly, Level 3's proposed language should be rejected.

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

Level 3 claims its proposed language for section 7.8 would give Level 3 “the ability to protect itself from unfounded demands when it has a good faith and bona fide basis for doing so.” Level 3 Br. at 155. But Level 3 already has that ability. Section 7 allows SBC to request a deposit only when certain enumerated circumstances are present. If SBC requests a deposit and Level 3 believes the request is “unfounded,” Level 3 can deny the request on the ground that the circumstances cited by SBC are not present. Then, a deposit will be required only if SBC prevails in the ensuing dispute resolution. It would make no sense, for the reasons SBC has provided (SBC Br. at 37-39), to *also* allow Level 3 to dispute a deposit request on the ground that it is “unreasonable.” Level 3 has failed to come to grips with this simple point.²

² Note that the second paragraph of Level 3's discussion of GT&C Issue 5 does not relate to Level 3's proposal that it be allowed to deny a request for deposit on grounds of “reasonableness.” Rather, that paragraph addresses a separate disagreement encompassed by GT&C Issue 5, the disagreement concerning SBC's proposed language for the tail end of section 7.8.1. SBC has not briefed that language because, as SBC's witness explained (*see* SBC Ex. 4.0 (Egan Direct) at 24-25), the language operates in favor of Level 3, and SBC has no interest in advocating it over Level 3's objection.

GT&C ISSUE 6:

**UNDER WHAT CIRCUMSTANCES MAY SBC
DISCONNECT SERVICES FOR NONPAYMENT?**

Level 3 argues that its proposed language – “and otherwise set forth in applicable law” – should be adopted because:

“[A]pplicable law,” particularly as it relates to the telecommunications industry, is in a perpetual state of flux. As such, no agreement can fully incorporate or allow for the changes that may occur in the law at some point in the future

Level 3 Br. at 168.

Level 3 has forgotten – at least for purposes of this issue – that the ICA will include, in GT&C section 21, an “intervening law” or “change of law” provision, the sole purpose of which is to allow the parties to adjust their agreement to the changes in law that will no doubt occur.³ Because the change of law provision will allow the parties to adjust the ICA to fit changing legal conditions, there is no need for a reference to “applicable law” in section 8.8.1 to accomplish the same thing.

Moreover, Level 3’s proposed reference to “applicable law” is not merely redundant – it is considerably worse than that. For the change of law provision in section 21 will include specific procedures for conforming the agreement to new legal developments. As a result, the adoption of Level 3’s “applicable law” language would create an anomaly: Most changes of law would affect the parties’ rights and responsibilities only in accordance with the terms, conditions and procedures in section 21. But a change of law in this particular, narrow area – and the random handful of other particular, narrow areas for which Level 3 makes the same “applicable law” proposal – would mean that changes of law in these areas, and these areas alone, would not

³ There is disputed language in section 21 (*see* GT&C Issue 10), but the parties agree on the basic operation of the provision, and agree the provision will, as Level 3 describes it, “maintain the Parties’ compliance with the ever changing landscape of telecommunications law.” Level 3 Br. at 173.

be subject to the terms, conditions or procedures of section 21. There is no rational basis for the distinction. Accordingly, Level 3's proposed invocation of "applicable law" should be rejected, both here and in the other instances where Level 3 proposes it.

Staff's brief, while not explicitly addressing Level 3's "applicable law" language, supports SBC's position on this issue by recommending (at p.6) "that the Commission accept SBC's position [on GT&C Issues 6 and 7], modified to accommodate certain concerns of Level 3" that are not tied to Level 3's "applicable law" proposal.

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?

The disputed language in section 9.2 embodies three disagreements. Foremost among them is whether, when a Level 3 failure to pay permits SBC to stop providing services to Level 3, the disconnection will be only for the services for which Level 3 did not pay or (if SBC so elects) for all services that SBC provides to Level 3 under the ICA.

Level 3 approaches the issue as if it were a question of crime and punishment: Does Level 3 deserve to have all of its services cut off if it fails to pay bills for certain services, or is that too "extreme"? This is not, however, a question about crime and punishment; it is a question about reducing the risk of loss when circumstances indicate the risk has become substantial. The reason SBC is allowed to stop providing service to Level 3 if Level 3 does not pay its bills is not that Level 3 has been naughty. Rather, it is that it would be commercially irrational for a vendor to keep providing services to a purchaser if the purchaser isn't paying its bills, because the vendor may never get paid. If Level 3 fails to pay its bills for unbundled loops, for example, and the non-payment reaches the point that justifies SBC in refusing to continue

leasing unbundled loops to Level 3, SBC would be just as foolhardy to lease transport to Level 3 as it would be to lease more loops to Level 3. And it would be unreasonable for this Commission to require SBC to do so.

Once again, Level 3 uses obfuscation and misstatement to try to salvage its commercially unreasonable position. Level 3's principal argument is this:

The interconnection agreements . . . are extremely complex, and this Commission is fully aware of the complexity of billing disputes between ILECs and CLECs. There are numerous reasons why a particular bill may be unpaid, including disputes that involve particular network elements, particular rates assessed, collocation facilities and/or interconnection arrangements. There may be a pending proceeding that would have an effect on Level 3's obligation to pay a bill for a particular unbundled network element that the Parties have not yet agreed on how to handle. If Level 3 fails to pay a bill for a particular service or network elements, SBC should have no claim to disconnect any other of Level 3's services.

Level 3 Br. at 169-170. That is hogwash, and Level 3 knows it. *Failure to pay bills can result in disconnection only when the bill is undisputed.* Section 9.2, which is the provision at issue here, says that in so many words. Twice.

In addition to the commercial irrationality of requiring SBC to continue to provide services to Level 3 – any services – if Level 3 fails to pay its undisputed bills, Level 3's proposal would invite mischief, because the non-paying CLEC could switch from one service to another in order to avoid disconnection. For example, a CLEC that fails to pay its resale bills could switch its resale customers to UNE lines, so that essentially the same services would be billed under different accounts and thus, under Level 3's approach, avoid disconnection. SBC Ex. 4.0 (Egan Direct) at 31. As a general proposition, SBC would not expect such behavior from Level 3. For purposes of deciding this arbitration issue, however, it would not be inappropriate for the Commission to postulate that a litigant that would make the deceptive argument about bill

disputes discussed above would also resort to deception in its dealings with SBC relating to the same subject matter.

Level 3 argues that “customers should not have to suffer the loss of service in the event that charges are unpaid for unrelated services.” Level 3 Br. at 164. That has a plausible ring, but it is actually nonsensical: Looked at from the point of view of Level 3’s customers, which is what Level 3 is asking the Commission to do, it makes no difference what services Level 3 failed to pay for. For example, if Jones is a Level 3 resale customer and Smith is a Level 3 UNE customer, and if the bills Level 3 fails to pay happen to be resale bills rather than UNE bills, that happenstance has nothing to do with Jones or Smith – indeed, they have no idea that they are UNE customers or resale customers – and there is no rational basis for cutting off the one and not the other. Once one accepts the common sense proposition that Level 3’s failure to pay its undisputed bills makes Level 3 a serious credit risk for SBC, SBC should not be required to continue to extend credit to Level 3 for any services; it makes no sense to draw the line at the services for which it happens Level 3 did not pay.

Staff recommends that SBC be permitted to disconnect only those services for which Level 3 fails to pay, but Staff’s rationale does not withstand scrutiny. As we have explained in detail (SBC Br. at 43-44) Staff’s stated concern about “engender[ing] confusion” is baseless. Indeed, even in its brief, Staff does not say who might get confused or about what. *See* Staff Br. at 7. And Staff’s attempt to draw a line between “end user customers who have nothing to do with the bill payment problem between the two carriers” and end user customers who do have something to do with the problem (Staff Br. at 7) is nonsensical, as discussed above. *See also* SBC Br. at 44. Finally, in this regard, Staff’s suggestion that the “public interest in maintaining service to end-users should take precedence” (Staff Br. at 7) is inapt in this case, because Level 3

does not have end-user customers. Level 3's customers are Enhanced Service Providers. Tr. (Oct. 18, 2004), at 62. In the unlikely event that SBC has to stop providing service to Level 3 because Level 3 fails to pay its undisputed bills, those ESPs would simply find an alternative provider.

With respect to the other two disagreements encompassed by GT&C Issue 7:

The disagreement about "may" vs. "shall" must be resolved in favor of SBC for the reasons set forth in SBC's initial brief (at 41-42). *See also* Staff Br. at 8 (supporting SBC's position). Level 3 did not address this point in its initial brief.

The disagreement over the period of time within which a party must pay what it owes after receiving a notice of "Unpaid Charges" (SBC's ten business days vs. Level 3's thirty calendar days) should be resolved in favor of SBC for the reasons set forth in SBC's initial brief (at 45-46). Level 3 continues to miss the point – or to pretend to miss the point – when it claims it needs thirty days to "perform the necessary internal analysis and audit and to respond to the unpaid charges notice." Level 3 Br. at 170. The point Level 3 is missing is that by the time a notice of Unpaid Charges is sent, Level 3 *already* had thirty days (plus however long it took after that for SBC to send the notice) to analyze the bill, and Level 3 determined it had no disagreement with the bill, which is why it did not dispute it; if Level 3 had disputed the bill, there would be no notice of Unpaid Charges.⁴

Finally, the Commission cannot properly adopt the recommendations Staff offers at page 6 of its brief, for the reasons set forth in SBC's initial brief at p. 47 n.34.

⁴ As to Level 3's related point that the parties need thirty days to discuss the matter, Level 3 can rest assured that if there is anything that warrants discussion, SBC will discuss it, as always. SBC is not going to stop providing services to Level 3 while the parties are in the midst of a bona fide discussion about Level 3's payment obligations.

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

As on the preceding issue, Level 3 is either confused or trying to cause confusion. By the time Level 3 receives a notice of Unpaid Charges, it already had thirty days (plus however long it took SBC to send the notice) to analyze the bill and either pay it or dispute it, and Level 3 failed to do either. Level 3 does not need *another* thirty days to do the same thing. In the scenario where Level 3, having received a bill, fails to pay it or dispute it when the Bill Due Date arrives thirty days later, and then receives (some time after that) a notice from SBC that the payment (or dispute) is overdue, ten business days, *i.e.*, two weeks or more, is enough time for Level 3 to notify SBC that it disputes the bill if it in fact has a ground for disputing it.

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?

The question presented by Issue 9(A) is whether SBC should be permitted to stop processing orders for Level 3 (not disconnect existing services, but stop processing orders for additional services) when Level 3 breaches its contract obligations in certain ways. And note that in the scenario at issue here, it is undisputed that Level 3 has actually breached the ICA, either by (a) failing to pay an *undisputed* bill, or (b) failing to dispute a bill by the deadline provided in the ICA, or (C) failing to pay a disputed amount into escrow, as the contract requires, or (d) failing to make a payment in accordance with an agreed payment plan. *See* GT&C

section 9.5.1. Level 3 does not dispute the proposition that SBC should be permitted to stop processing orders for Level 3 at some point under those conditions; indeed, Level 3 does not dispute SBC's proposed language at all as it relates to condition (c) or (d). Rather, Level 3 contends only that SBC should not be allowed to stop processing orders for Level 3 "on the day that SBC has sent out a second late payment notice" (Level 3 Br. at 171) – in other words, that Level 3 should be allowed additional time (though Level 3 does not say how much additional time) after SBC sends out the second late payment notice.

To determine whether SBC's proposal for conditions (a) and (b) is, as Level 3 contends, too precipitous, the Commission must focus on the sequence of events that culminates in the sending of the second late payment notice: First, SBC sends the bill. The Bill Due Date is thirty days later (*see* section 8.1.1), and on that date, Level 3 must, pursuant to *agreed* sections 8.1 and 8.4, either pay the bill or dispute the bill. In the scenario at issue, Level 3 has failed to do that. Consequently, SBC, pursuant to section 9.2, sent Level 3 a first notice, demanding payment within a specified time (either ten business days or thirty calendar days, depending on how the Commission resolves GT&C Issue 8). In that first notice, SBC informed Level 3, as required by section 9.2, that if it did not pay the undisputed amounts within the specified time, it would risk disruption or disconnection of service.

In the scenario at issue, Level 3 received that first notice and nonetheless failed to pay within the specified time – and also failed (again) to dispute the bill, as section 9.3.1 allowed it to do even after receiving the first notice. Thus, Level 3, in this hypothetical situation, is behaving very much like a deadbeat: It failed to pay the bill when it was due, or to dispute the bill as the ICA allowed it to do. Then, after receiving a demand to pay within the time that the Commission will establish in this proceeding, Level 3 has done nothing. So now, SBC, proceeding under

agreed language in section 9.5.1, sends Level 3 a *second* demand for payment. And only now, when SBC is sending that second demand, does SBC propose to stop processing orders for new services for Level 3. Level 3 objects to SBC's proposal, though, on the ground that it is too soon for that. SBC thinks not.

As to Issue 9(B), in the extreme circumstances covered by section 9.5 and described above, SBC must be permitted to stop processing all Level 3 orders for new service, not just orders for the same products or services with respect to which Level 3 is in default. Level 3's position, that SBC must continue to process new Level 3 orders for, say, UNEs even though Level 3 is indisputably in breach of its obligation to pay for, say, collocation – double breach, actually, since Level 3 both missed the Bill Due Date and ignored the first notice – is commercially unreasonable.

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

First, Level 3's brief says nothing about SBC's proposed language for GT&C section 21.4, which sets forth the procedure that must be followed in the event of a change of law. That language must be included in the Agreement regardless of the Commission's resolution of the parties' disagreement concerning sections 21.1, 21.2 and 21.3. *See* SBC Br. at 50.

Second, the Commission should reject Level 3's criticisms of sections 21.1, 21.2 and 21.3. One of those criticisms is that those provisions are too "voluminous," and that the purported "minutia . . . will only lead to confusion." Level 3 Br. at 172-73. SBC disagrees. It is true that SBC's proposed language for 21.1, 21.2 and 21.3 is very detailed, but there is nothing confusing about it. On the contrary, what admittedly appears now as a long and detailed catalogue of particulars that may result in a change of law event will, if the catalogue is

consulted upon the occurrence of such an event, serve to eliminate possible disputes. Moreover, upon the occurrence of such an event, the focus will be on one discrete piece of the language, so the voluminousness that Level 3 complains about will not be a factor.

Level 3 also claims SBC's proposed language comprises "unilateral interpretations" that are "self-serving." Level 3 Br. at 173. That simply is not so. Merely by way of example, the first two specific references in SBC's language are:

any decision by the Eighth Circuit relating to any of the costing/pricing rules adopted by the FCC in its First Report and Order, In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996)(e.g., Section 51.501, et seq.), upon review and remand from the United States Supreme Court, in AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999) or Ameritech v. FCC, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (June 1, 1999);

and

Without limiting the general applicability of the foregoing, the Parties acknowledge that on January 25, 1999, the United States Supreme Court issued its opinion in AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999) and on June 1, 1999, the United States Supreme Court issued its opinion in Ameritech v. FCC, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (1999).

Detailed and specific, yes. Interpretative and self-serving, clearly not. In fact, Level 3 does not identify a single specific reference in SBC's language that constitutes an interpretation, self-serving or otherwise. If Level 3's characterization were accurate, Level 3 would be able to provide at least an example.

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?

The Commission should approve SBC's proposed language for section 29.1 for the reasons set forth in SBC's brief at pp. 50-52. Level 3's brief says nothing to justify the

proposition that any company (including a Level 3 affiliate) that has an interconnection agreement with SBC should be allowed to abandon that agreement, in whole or in part, in favor of provisions in another interconnection agreement that it prefers (including Level 3's interconnection agreement with SBC).⁵

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?

Level 3's proposed definition of “Access Tandem Switch” mistakenly encompasses only switches used exclusively for passing traffic to interexchange carriers (“IXCs”). Level 3's proposed definition is inaccurate, because in the real world, SBC's Access Tandem Switches are capable of handling many different traffic types – not just IXC-carried traffic. SBC Ex. 1.0 (Albright Direct) at 7-8, 78-89. Indeed, there are Access 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, 78-89. Plainly, it would be nonsensical to define “Access Tandem Switch” inaccurately, as Level 3 proposes, merely because “historical[ly]” they “were only used for passing traffic to IXCs” (Level 3 Br. at 174). Contrary to Level 3's claim (*id.*), defining Access Tandem Switches in a manner inconsistent with their actual capability would not avoid disputes, but would breed them. As for Level 3's criticism that SBC's proposed definition varies depending on the state involved, again, such differences are a result of the actual capabilities of switches in question.

⁵ Level 3 states that it “understand[s] that SBC's [position] is based solely on SBC's asserted limitations in its billing systems.” Level 3 Br. at 173-74. That understanding is mistaken, and inexplicable: Level 3 knows full well that the basis for SBC's position is the one set forth in SBC's brief – and not a billing limitation – because SBC briefed the issue in another state a full week before Level 3 filed its initial brief in this proceeding.

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”?

Level 3 asserts that its proposed term “Call Record” “allows for more flexibility for the parties to agree to new or different technologies in recording.” Level 3 Br. at 175. That is incorrect. The parties *always* have complete flexibility to agree to use new or different technologies for call recording purposes. If any such technologies are developed, the parties agree to amend the portions of the agreement that require use of CPN. As Level 3 is unable at this time to identify any such new technologies, however, no purpose is served by adopting Level 3’s proposed language, and the Commission should order the parties to use the industry-standard CPN. Level 3’s brief says nothing else on this issue that SBC did not address in its initial brief.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its opening brief. As SBC explains below under IC Issue 2, Level 3’s proposed distinction between, and definitions of, “Circuit Switched” and “IP Enabled” traffic are not consistent with current federal law, and must therefore be rejected.

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?

Level 3’s brief (at 176-77) ties this issue to UNE Issue 1, which SBC Illinois has fully addressed both in its initial brief and in this reply brief.

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

SBC proposes a definition of “Demarcation Point” that is straightforward, concise, and consistent with applicable regulations. Level 3 tries to sneak into the definition a statement about the parties’ substantive obligations. In support of its position, Level 3 relies on “FCC orders and regulations” and testimony by one of SBC’s witnesses. Neither of these is availing.

First, although Level 3 asserts that its language is consistent with “FCC orders and regulations” (Level 3 Br. at 177), Level 3 does not actually cite any orders. And the only regulation it cites is 47 C.F.R. § 68.3. *Id.* While 47 C.F.R. § 68.3 tracks the language agreed by the parties in the first sentence of the definition of “Demarcation Point,” the parties’ dispute pertains to a portion of the second sentence of that definition. And 47 C.F.R. § 68.3 sheds no light on that sentence, or on Level 3’s proposal that the “Demarcation Point” shall define the boundary for determining the legal, technical and financial responsibilities of each party.

Level 3’s reliance on the testimony of SBC witness Albright is similarly misplaced. Level 3 Br. at 178. Indeed, Level 3’s argument proves SBC’s point: Definitions should define terms, not set out the parties’ substantive obligations. The excerpt Level 3 cites comes from Mr. Albright’s discussion of substantive issues relating to the NIM Appendix, in particular, how

Level 3 would interconnect with SBC and the financial arrangements attendant on that interconnection. SBC Ex. 1.0 (Albright Direct) at 17-23. In other words, the parties were litigating, in the context of the substantive provisions of the NIM Appendix, the apportionment of legal, technical and financial arrangements between the parties. That is where such issues should be litigated, not in the context of a definition in the GT&C Appendix.

The parties settled the NIM issues discussed in the Albright testimony cited by Level 3, and Level 3 abandoned its attempt to include language in the NIM Appendix that provided that the POI “serves as a *legal, technical, and financial* demarcation point between the facilities that each Party is responsible to provide.” (Emphasis added.)

For these reasons and the reasons set forth in SBC’s initial brief, the Commission should reject Level 3’s proposed language for the definition of “Demarcation Point.”

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?

Level 3’s brief says nothing on this issue that SBC did not address in its opening brief. SBC notes that, while the FCC’s description of an ISP may “stem[] from” an order “more than 20 years old,” as Level 3 asserts (at 179), it more directly stems from an FCC order from 1997. That is, SBC proposes to reference an FCC order from 1997, where the FCC reaffirmed the long-standing description of an ISP. Moreover, the FCC has yet to modify that description. Accordingly, the Commission should resolve this issue in favor of SBC.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its opening brief, and in SBC’s discussion of the geographic scope of the traffic covered by the *ISP Remand Order* (IC Issue 5) in its opening brief and this reply.

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

See GT&C Issue 9(B) below.

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?

In GT&C Definitions Issues 9, 11, 12, and 14, Level 3 opposes SBC’s proposed definitions of “local/access tandem switch,” “local/intraLATA tandem switch,” “local only tandem switch,” and “local tandem switch,” and proposes that those definitions be replaced with one definition of “tandem switch” as follows: “A switching machine within the public switched telecommunications network that is used to connect the switch trunk circuits between and among other central offices switches.” Level 3 Br. at 184.

It is not appropriate to include in the interconnection agreement one broad definition of the term “tandem switch,” because there are different types of tandem switches, each of which is provisioned to handle specific kinds of traffic. SBC Ex. 1.0 (Albright Direct) at 7-10, 78-89. For example, SBC’s “Local Only” tandem switches are provisioned to handle 251(b)(5) local traffic and ISP-bound traffic, but not IXC traffic (*id.* at 86-87); because of this, Level 3 has agreed to route only local traffic to these Local Only tandem switches (Cal. Tr. (Oct. 26) at 241-242). In order to implement Level 3’s commitment, the interconnection agreement

obviously must define a “Local Only” tandem. And if we are going to define “Local Only” tandems based on the traffic they are equipped to handle, it only makes sense to define other tandems on the same basis. Moreover, the interconnection agreement at issue here repeatedly refers to different types of tandems – not only in disputed language, but also in agreed language. SBC Ex. 1.0 (Albright Direct) at 78-89. Accordingly, for the agreement to make sense and be workable, these different types must be defined.

Level 3 does not dispute that SBC’s proposed definitions accurately reflect the types of traffic specific tandem switches are provisioned to handle – as evidenced by its commitment to carry only local traffic to “Local Only” tandem switches. Instead, Level 3 argues that SBC’s proposed definitions should not be adopted because they fail to “allow[] for Level 3 to exchange all types of traffic over the local interconnection trunks and facilities.” Level 3 Br. at 180. That is not so. The question of what traffic may ride on local interconnection trunks is separate and distinct from this issue, and is the subject of ITR Issue 11(A). Moreover, Level 3’s argument flies in the face of Level 3’s commitment to route only local traffic to SBC’s “local only” tandems.

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

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9, and 10 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9 and 10 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion.

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

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9 and 11 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion and in SBC’s discussion of GT&C Definition Issue 9(B) above.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9 and 11 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion and in SBC’s discussion of GT&C Definition Issue 9(B) above.

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

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9, and 12 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion and in SBC’s discussion of GT&C Definition Issue 9(B) above.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9, and 12 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion and in SBC’s discussion of GT&C Definition Issue 9(B) above.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9, and 13 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion.

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

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9, and 14 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion and in SBC’s discussion of GT&C Definition Issue 9(B) above.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11 and GT&C Definition Issues 1, 9, and 14 in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion and in SBC’s discussion of GT&C Definition Issue 9(B) above.

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?

See discussions of GT&C Issue 6 above and NIM issue 7 below.

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

The question is whether the definition of “Out of Exchange LEC” or “OE-LEC” should include a reference to a possible “successor-in-interest” to SBC. Level 3 stresses that SBC devised the term “Out of Exchange LEC” (Level 3 Br. at 185), but that is irrelevant. Whether or not “Out of Exchange LEC” is a term that is recognized in Newton’s or in technical industry publications, the law is clear that SBC’s obligations under section 251(c) do not extend to areas where SBC is not the incumbent local exchange carrier, and Level 3 offers nothing that suggests otherwise.

Level 3 also notes that “[i]t is perfectly normal for a CLEC to provide service in geographic areas that do not follow traditional ILEC and ICO service areas.” *Id.* at 186. That is true, but it does not change the fact that geographic areas still matter (and indeed are typically dispositive) when it comes to obligations imposed on incumbent LECs. This is such a case, where SBC’s obligations as an ILEC turn on whether the geographic area at issue is or is not one in which SBC is the ILEC. Section 251(h)(1) limits a carrier’s obligations as an ILEC (*i.e.* its 251(c) obligations) to those areas where it is the incumbent carrier.

Finally, Level 3 suggests its proposed reference to a potential “successor-in-interest” is required by section 251(h) of the Act. Level 3 Br. at 186. Level 3 is mistaken. Again, section 251(h)(1) limits a carrier’s obligations as an ILEC to those areas where it is the incumbent carrier; section 251(h)(1)(b)(ii) then makes clear that if another carrier becomes “a

successor or assign of” the first carrier, then that second carrier becomes the ILEC for that area, with all the attendant obligations. Under Level 3’s proposal, if a carrier became a successor to SBC, those obligations would somehow remain with SBC, instead of passing to the successor entity. Section 251(h) provides just the opposite.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its opening brief, and in SBC’s discussion of IP-PSTN traffic, Section 251(b)(5) Traffic, and Transit Traffic (IC Issues 2 and 3, ITR Issues 5 through 9) in its initial brief and this reply. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth there.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its initial brief, and in SBC’s discussion of Section 251(b)(5) Traffic (IC Issue 3) in its initial brief and this reply. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth there.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its initial brief.

Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth there.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its initial brief, and in its discussion of FX traffic (IC Issue 11) in its initial brief and this reply. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth there.

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

The resolution of this issue is simple:

1. The coordination service for hot cuts that is the subject of this issue is an optional service; nothing in the 1996 Act or any FCC rule or any other source of law requires SBC to provide coordinated hot cuts to Level 3;
2. SBC cannot lawfully be required to provide at TELRIC rates any product or service that SBC is not required to provide at all; therefore

3. SBC cannot lawfully be required to provide hot cut coordination to Level 3 at TELRIC rates.

Level 3 admits premise #1. It agreed to language in CHC section 2.1 that states that coordinated hot cut service is optional. *See* SBC Br. at 71.

Level 3 does not dispute premise #2 – and it cannot.

That is the end of the issue. Level 3 can insist as many times as it likes that coordinated hot cuts should be priced at TELRIC – and it does so four or five times in its brief (at pp. 199-200) – but Level 3 does not say *why*, because it has no answer for the inescapable conclusion that since the service is optional, it does not have to be priced at TELRIC.

Furthermore, the Commission resolved this same issue just last year in the SBC Illinois/AT&T arbitration, where the Commission concluded:

The [coordinated hot cut] service takes extra time to make sure that both companies perform a cutover at the same time. SBC maintains that it should be entitled to additional labor rates for the work performed

We agree with SBC. If the technicians take extra time to perform the necessary work involved, SBC should be compensated for the work. SBC should apply the labor rates set forth in the SBC's FCC Access Tariff No. 2. AT&T has failed to justify that SBC should develop a nonrecurring charge for the service.

Arbitration Decision, Docket No. 03-0239, at p. 107.

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

Level 3 lumps its discussion of this issue with IC Issue 3, and asserts that SBC's proposed language should be rejected because of SBC's use of the term "Section 251(b)(5) Traffic." Level 3 Br. at 88-89. This issue is more fully discussed under IC Issue 3, where SBC explains that Level 3's objection to SBC's terminology is without merit. Level 3's brief says nothing else on this issue that SBC did not address in its opening brief.

Staff correctly states (at 12) that “Level 3’s proposed classifications do not closely track distinctions in intercarrier compensation that have been identified in the agreed language,” and thus “the Commission [should] reject them.” SBC’s proposed classifications, on the other hand, “track very closely the distinctions” made in the IC Appendix. Staff Br. at 13. Staff, however, asserts that one additional classification should be added, for “IP-PSTN VoIP traffic.” *Id.* The Commission should reject Staff’s proposal.

Staff notes that “the FCC is addressing reciprocal compensation for IP-enabled services specifically and separately from other types of traffic,” and suggests that the parties’ agreement should list this traffic to “identify that IP-PSTN VoIP traffic is not, at this time, subject to the intercarrier compensation provisions applicable to any of the other classes of traffic in this contract.” Staff Br. at 13. Staff is mistaken. While the FCC is *considering* new rules that might apply “specifically and separately” to IP-PSTN traffic, at the current time there are *not* any special intercarrier compensation rules for IP-enabled services traffic. Rather, IP-PSTN traffic currently *is* “subject to the intercarrier compensation provisions applicable” to “other classes of traffic.” That is, local IP-PSTN traffic is just local traffic subject to reciprocal compensation under Section 251(b)(5), and interexchange IP-PSTN traffic is just another form of interexchange traffic. Thus, under the current FCC intercarrier compensation regime, IP-PSTN VoIP traffic is not a separate form of traffic “that is receiving specific and unique treatment,” as Staff suggests (at 13), and thus the agreement should not separately classify that traffic.

Indeed, the FCC’s *Access Avoidance Order* makes clear that IP-enabled services traffic is not currently a separate class of traffic for intercarrier compensation purposes. In the *Access Avoidance Order*, the FCC did not create any new rules relating to VoIP traffic; it applied its *preexisting* rules to such traffic, namely, the provisions of 47 C.F.R. § 69.

Level 3 Br. at 56. 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 its very recent *Vonage Preemption Order*, the FCC announced that it has determined that the characteristics of certain IP-enabled services “preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme,” and instead such services are exclusively jurisdictionally interstate. *Vonage Preemption Order*, ¶ 14.⁶ Thus, this Commission does not have independent state authority to regulate the terms and conditions for the exchange of such traffic.

Level 3, however, fails to make clear the consequence of its point that the FCC has exclusive authority to establish intercarrier compensation for VoIP traffic. The consequence is this: in this arbitration, the Commission cannot independently create new intercarrier compensation requirements for VoIP traffic; under the authority of Sections 251 and 252 of the Act, it can only ensure that the parties’ interconnection agreement is consistent with the current requirements of federal law. And that is what SBC is asking the Commission to do. As SBC has explained, federal law currently requires that VoIP traffic be subject to access charges (and cannot be made subject to reciprocal compensation under section 251(b)(5)) when it is interexchange in nature, and here the Commission must implement that federal law. That is all SBC’s proposed language provides. 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 intercarrier compensation rules, extending the FCC’s ESP

⁶ Order, *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. 12, 2004) (“*Vonage Preemption Order*”).

exemption to cover carriers that are not ESPs, extending that exemption to cover all “information services,” creating a new access charge exemption for interexchange IP-PSTN and PSTN-IP traffic, and treating 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.

Next, Level 3 embarks on a long overview of the history of the FCC’s distinction between “enhanced” and “basic,” and “information” and “telecommunications,” services. Level 3 Br. at 56-62. The point of Level 3’s discussion is not entirely clear. Even if the FCC has exclusive authority to establish the intercarrier compensation rules for VoIP traffic (and it does, though not necessarily for all the reasons suggested by Level 3), that does not mean this Commission is prohibited from *applying* the FCC’s existing rules to this traffic, just as, for instance, the Commission applies the FCC’s TELRIC rules to particular UNEs to establish prices.

Level 3 ends its history lesson with the startling proposition that “the FCC has never modifies [sic] its prior findings that IP-Enabled traffic, which involved a net protocol conversion are not subject to access charges.” Level 3 Br. at 62. SBC cannot say this strongly enough: *the FCC has never made any such finding, which is why Level 3 has failed to identify any such finding*. That is also why Level 3 filed a petition asking the FCC to *forbear* from the application of access charges to interexchange PSTN-IP and IP-PSTN services. And again, Level 3 cites to *nothing* in support of its remarkable claim. To the contrary, Level 3’s history lesson shows only that (1) the FCC created the “ESP exemption” from access charges (Level 3 Br. at 60), and (2) in the *Stevens Report* the FCC stated that IP-to-IP traffic (which the FCC described as

“computer-to-computer IP telephony”) does not appear to be the provision of “telecommunications,” while reserving judgment on whether other forms of IP telephony are “telecommunications” (*id.* at 61-62). IP-to-IP traffic simply is not at issue here; the issue here is interexchange VoIP traffic that use the PSTN (*e.g.*, IP-to-PSTN traffic). And the ESP exemption is just that: an exemption *for ESPs* in certain circumstances defined by the FCC, not an exemption for all “IP-Enabled traffic.”⁷ Indeed, there is no FCC rule that says VoIP traffic is exempt from access charges under the ESP exemption, and Level 3 has not (and cannot) point to one.

Level 3 also attempts to establish that VoIP services are interstate information services. Level 3 Br. at 64-68. *See also id.* at 85. Again, this discussion is irrelevant.⁸ Traffic does not magically become exempt from access charges, nor does it become subject to reciprocal compensation under section 251(b)(5) (Level 3’s proposal here), because it is “information services” traffic or because it is “interstate.” Just the opposite is true. The FCC long ago observed that information service providers are “[a]mong the variety of users of access service,” and for that reason, when the FCC created the access charge regime, its “intent was to apply these carrier’s carrier charges to interexchange carriers, and to all resellers and *enhanced service providers.*” *MTS/WATS Market Structure Order*, ¶¶ 76, 78 (emphasis added). Accordingly, the FCC has never created a broad access charge exemption for “information services.” Instead, the FCC created the narrow ESP exemption. That exemption does not exempt *all* information

⁷ Moreover, the FCC’s *Access Avoidance Order* establishes the opposite of what Level 3 claims. In that order, the FCC held that PSTN-IP-PSTN services – which fall under Level 3’s proposed definition of “IP-Enabled Services” – are subject to access charges. *Access Avoidance Order*, ¶ 1.

⁸ It should be noted that Level 3 does not provide actual VoIP services to end-users. Rather, Level 3 provides “building block” IP-based services to its wholesale service provider customers, who in turn provide actual VoIP services to end-users.

services traffic from access charges, but applies only when certain circumstances are met, as explained in SBC's opening brief, and as explained further below. Moreover, the FCC Rule that governs reciprocal compensation under section 251(b)(5) 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) (emphasis added)), and section 251(g) of the Act preserves the "access regime applicable to this traffic." *ISP Remand Order*, ¶ 37.

Level 3's attempt (at pages 64 and 68-71 of its brief) to show that the ESP exemption applies here falls on its face. As Level 3 states, under the ESP exemption the FCC's rules "treat ESPs as end users, rather than carriers, with respect to carrier access charges." Level 3 Br. at 69. The issue here, however, is intercarrier compensation for traffic that, for instance, originates from an end-user customer of a VoIP service provider that is a wholesale customer of Level 3, and then is transported across exchanges by Level 3 and delivered by Level 3 to SBC Illinois for termination to an SBC Illinois end-user (IP-PSTN traffic). That is, the issue here is not whether the *ESP* (assuming the VoIP service provider qualifies as an ESP) has to pay access charges, but whether Level 3, as the interexchange carrier serving the ESP, has to pay terminating access charges to SBC Illinois. Level 3 must pay such access charges, because, as Level 3 admits, Level 3 is not an ESP; rather, it is an interexchange carrier that serves ISPs. *See* Tr. 182 (admitting that Level 3 is not an ESP and "will not become an ESP"). *See also* Tr. 185 (admitting that Level 3 "is not a voice over Internet protocol provider," but is "a telecommunications carrier"). As the FCC has explained, 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*, ¶ 21.⁹ But ESP “[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers.” *Id.*¹⁰

Level 3 implicitly admits that the ESP exemption does not apply here when it asserts that “FCC rules also prohibit an ILEC from assessing access charges on an interconnected CLEC that serves an IP-enabled information services provider.” Level 3 Br. at 73. Once again, Level 3 is admitting that it is not an “information services provider,” but rather is at most a carrier that serves ESPs. Moreover, the FCC “rule” to which Level 3 refers (at 73-74) does not apply here. In the *Access Avoidance Order*, the FCC stated that access charges “should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.” *Access Avoidance Order*, n.92. But SBC does not seek to “assess access charges against a CLEC as a means of assessing charges against the interexchange carrier,” as Level 3 suggests. See Level 3 Br. at 73. With respect to interexchange IP-PSTN traffic that Level 3 transports between exchanges, Level 3 is not “a CLEC serving an information service provider” (*id.* (emphasis added)), but is an *interexchange* carrier serving an ESP. Thus, under the FCC’s current rules, Level 3 must pay access charges.

Level 3 also asserts that the 1996 Act, and in particular section 251(g), bars the application of access charges to IP-PSTN traffic. Level 3 Br. at 71-72. Again, Level 3 is wrong.

⁹ 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*”).

¹⁰ To be clear, it is SBC’s position that *Level 3*, not its ESP customers, is required to pay access charges on interexchange IP-PSTN traffic, and thus SBC proposes contract language making clear that Level 3 (and, again, not its ESP customers) is subject to such charges.

Level 3 cites the D.C. Circuit’s holding, on review of the *ISP Remand Order*, that the FCC’s reliance on section 251(g) was misplaced because there was no pre-1996 Act rule governing the exchange of the ISP-bound traffic at issue in that order (“local” ISP-bound traffic). But the *ISP Remand Order* did not address VoIP traffic; it addressed only local dial-up traffic to an ISP.¹¹ Here, there clearly *was*, and is, a pre-Act rule requiring the application of access charges to interexchange VoIP traffic, as the *Access Avoidance Order* makes clear. In the *Access Avoidance Order*, the FCC did not create any new rules relating to VoIP traffic; it applied its *preexisting* rules to such traffic, namely, the provisions of 47 C.F.R. § 69. As SBC has explained, the FCC’s access charge regime requires the application of access charges to all interexchange traffic that uses the local switching facilities of the PSTN, and those rules make no distinction 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). This rule applies whether the carrier delivering the interexchange traffic to the PSTN uses TDM, wireless, IP, or any other transmission technology. This is undoubtedly why Level 3 has asked the FCC to *forbear* from applying its Part 69 Rules (as well as FCC Rule 701 and section 251(g) of the 1996 Act) to VoIP traffic. Of course, Level 3’s Forbearance Petition to the FCC completely belies all of its legal assertions before this Commission on the issue. And even if this were not the case, federal law unquestionably prohibits the classification of such interexchange traffic as local traffic subject to the reciprocal compensation provisions of section 251(b)(5), as Level 3 proposes.

¹¹ Level 3 mistakenly asserts that “the D.C. Circuit rule[d] that section 251(g) cannot function as a ‘carve-out’ with respect to IP-enabled services traffic because there was no pre-1996 rule governing the exchange of such traffic.” Level 3 Br. at 71. *See also id.* at 85 (making the same assertion). The D.C. Circuit made no such ruling, because it addressed only the *ISP Remand Order*, and the *ISP Remand Order* did not address “IP-Enabled services traffic” – it addressed ISP-Bound Traffic.

Finally, Level 3 asserts that *intrastate* access charges “cannot apply to IP-Enabled services traffic” because such services are “indivisibly *interstate*.” Level 3 Br. at 74. SBC has urged the FCC to conclude that only *interstate* access charges apply to such traffic. And, given the FCC’s holding in the Vonage proceeding that VoIP services are jurisdictionally interstate, it may be that interexchange IP-PSTN traffic will be subject only to federal access charges, and not intrastate access charges, regardless of whether the traffic is physically intrastate or interstate. That issue, however, has yet to be determined, because the FCC’s order in the Vonage proceeding expressly declined to address intercarrier compensation issues, leaving them for resolution in the IP-Enabled Services Proceeding. *Vonage Preemption Order*, n.46. In the meantime, however, the Commission should adopt SBC’s proposed contract language, which provides for compensation for IP-PSTN traffic at the applicable “jurisdictionalized” access rate (interstate or intrastate) in accordance with SBC’s existing switched access tariffs. *See* SBC Ex. 6.0 (Kirksey Direct) at 12-13. It should be noted that, even if VoIP services are jurisdictionally interstate, that would not necessarily mean the Commission-established intrastate access charges would no longer apply. It is conceivable that the FCC, exercising its rulemaking authority over interstate services, could establish a rule requiring the payment of intrastate access charges for VoIP traffic that is physically intrastate (although jurisdictionally interstate).

Level 3’s definitions of “IP-Enabled Services” and “Circuit Switched Traffic” must be rejected. Level 3 proposes to define and distinguish between “IP-Enabled Services” traffic and “Circuit Switched” traffic, making only the latter subject to access charges (except for “local circuit switched” traffic, which would be subject to reciprocal compensation). Contrary to Level 3’s claim (at 74-77 and 88 of its brief), this proposal does not track FCC decisions.

Level 3 points to the *Access Avoidance Order* in support of its “Circuit Switched” traffic definition. Level 3 Br. at 76 n.182. There, the FCC held that AT&T’s PSTN-IP-PSTN service is subject to access charges, noting that that service exhibits a number of characteristics similar to traditional circuit switched interexchange calls. *See id.* (quoting *Access Avoidance Order*). Nowhere, however, did the FCC hold that *only* traffic that exhibits those particular characteristics is subject to access charges. But that is precisely what Level 3 unlawfully attempts to achieve with its proposed definition of “Circuit Switched” traffic.

To be clear, SBC agrees with Level 3 “that PSTN-IP-PSTN calls with no net protocol conversion and without enhanced functionality are traditional circuit switched calls to which access charges would apply.” *Id.* at 77. That is the holding of the *Access Avoidance Order*. But that is not the *only* traffic that is subject to access charges under the FCC’s current rules, and nothing in the *Access Avoidance Order* suggest that it is. In particular, as SBC has explained, interexchange IP-PSTN and PSTN-IP traffic is subject to access charges under existing rules.

Level 3’s proposed definition of “IP-Enabled Services” traffic fares no better. For one thing, as Level 3 notes, “the FCC is currently conducting a rulemaking to determine how [this] term should be defined.” *Id.* at 75. The Commission should not, and need not, anticipate the FCC’s decision by adopting a definition of “IP-Enabled Services” traffic here. SBC’s proposed language does not use the term “IP-Enabled Services,” and does not endeavor to define that term.¹² Rather, SBC’s proposed language merely makes clear that two particular types of interexchange VoIP traffic (IP-PSTN and PSTN-IP-PSTN) are subject to access charges like any

¹² Level 3 repeatedly makes assertions concerning “SBC’s proposed definition of ‘IP Traffic.’” *See, e.g.*, Level 3 Br. at 65-66, 74-75. But, for purposes of the Inter-carrier Compensation Appendix, SBC does not propose to use or define that term. Thus, Level 3’s entire discussion of “SBC’s proposed definition” is a straw man created by Level 3, and should be disregarded.

other interexchange traffic. App. IC, SBC § 16.1.¹³ SBC notes that Level 3’s petition to the FCC for forbearance did not even once use the term “IP-Enabled Services,” but instead addressed only “IP-PSTN” and “PSTN-PSTN” (*i.e.*, PSTN-IP-PSTN) traffic.

Level 3’s policy arguments are without merit. SBC defused Level 3’s “policy” arguments in its opening brief, and will not repeat that discussion at length here. To summarize, Level 3’s suggestion that “applying access charges to IP-Enabled Services traffic would suppress the development of competitive telecommunications” (Level 3 Br. at 79) is balderdash, even if that policy argument had any relevance in this section 252 arbitration (which it does not). Carriers paying access charges for interexchange IP-PSTN traffic would only pay *half* the charges assessed to traditional interexchange service providers (because traditional providers pay both originating *and* terminating access charges, while carriers providing interexchange transmission of IP-PSTN traffic would pay only originating *or* terminating access charges, depending on whether the IP-PSTN traffic originated or terminated on the PSTN). And Level 3’s suggestion that even this is too much is nonsense. If IP technology is truly a more efficient, superior technology, as Level 3 asserts, then the success of that technology does not depend on an artificial regulatory hand-out – an exemption from the access charge requirements that apply to all other interexchange carriers that use the PSTN in the *same* way to originate or terminate interexchange traffic.

¹³ Level 3 attempts to make a big hullabaloo of the fact that SBC’s section 16.1 mentions IP-PSTN traffic but not PSTN-IP traffic, asserting that SBC “is attempting to convince the Commission that IP-Enabled Services are only a one-way concept, IP to PSTN.” Level 3 Br. at 65. That is not the case, as SBC’s opening brief makes crystal clear. SBC stated there that IP-PSTN and PSTN-IP traffic are the flip side of the same coin: originating access charges are due for interexchange PSTN-IP calls, and terminating access charges are due for interexchange IP-PSTN calls. When an SBC end user originates a call, SBC’s switch has no way of knowing whether the call is destined to an IP-based network or the PSTN, but simply analyzes the number that was dialed. If the call is local, it is routed as such, and SBC pays reciprocal compensation, whether the call is PSTN-IP or PSTN-PSTN or PSTN-IP-PSTN. If the call is not local, it is routed to the caller’s presubscribed IXC, and originating access charges are assessed on the IXC, whether the call is PSTN-IP or PSTN-PSTN or PSTN-IP-PSTN.

Level 3 also refers to the Commission's comments to the FCC suggesting that the FCC should establish intercarrier compensation for IP-enabled services at a lower level than current access charges. Level 3 Br. at 78-79. Those comments are irrelevant here. The issue in this arbitration is what the FCC's current rules require, not what its future rules *should* require. Both SBC and Level 3 have agreed to contract language providing that the parties will implement future FCC requirements regarding intercarrier compensation. In the meantime, however, as Level 3 admits, and as a result of the FCC's *Vonage Preemption Order*, the Commission does not have authority to modify or ignore the FCC's current rules to suit its (or Level 3's) policy preferences.

Level 3 also suggests that imposing access charges on IP-PSTN traffic would be “discriminatory” because “SBC does seek to impose access charges to Level 3 for the same traffic that if routed to an SBC-ESP customer would not be subject to access charges.” Level 3 Br. at 79. As a threshold matter, Level 3's hypothetical mixes apples and oranges, because Level 3 is not an SBC-ESP customer. And even if Level 3's hypothetical were both relevant and correct, the outcome that Level 3 decries would result because *that is what federal law requires*. Under the FCC's ESP exemption, *ESPs* are exempt from certain access charges, but ESP “[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers.” *Northwestern Bell Order*, ¶ 21. Level 3 may believe that this federal law is flawed (*see* Level 3 Br. at 83, asserting that this law results in an “uneven competitive field”), but this Commission cannot toy with the FCC's rules to modify the ESP exemption. As Level 3 states, “the FCC has exclusive authority over compensation for IP Enabled Services.” *Id.* at 56.

Moreover, Level 3's "policy" argument stands the proper policy inquiry – assuming the Commission could engage, and were engaged, in policymaking in this arbitration – on its head. In fact, Level 3 has the policy inquiry backwards – the proper inquiry would be whether there is any economic justification to treat IP-enabled interexchange traffic *differently* than other interexchange traffic. The answer to that inquiry is that no such economic justification exists. Certainly, Level 3 has not provided one. And, in any event, the FCC has now held in the Vonage proceeding that such policymaking is exclusively within the FCC's purview, not the purview of state commissions.

Level 3 also asserts that SBC's proposal is "anticompetitive" and "unworkable" because SBC would apply access charges to "local" IP-PSTN traffic, instead of reciprocal compensation. Level 3 Br. at 80-82. Here Level 3 is simply misreading SBC's proposed contract language. SBC proposes to apply access charges to *interexchange* IP-PSTN traffic, but "local" IP-PSTN traffic would be treated like any other local traffic for intercarrier compensation purpose, unless and until the FCC modifies the existing intercarrier compensation regime. *See* SBC § 16.1; SBC Ex. 6.0 (Kirksey Direct) at 17.

Finally, Level 3 suggests that SBC's proposed language must be rejected because "it is not possible to track the geographic end point of the IP end of an IP-enabled service." Level 3 Br. at 83. *See also id.* at 86. Putting aside the fact that Level 3's sudden insistence on the need to meticulously identify precise physical locations is inconsistent with its position that physical locations are irrelevant to determining intercarrier compensation (because, Level 3 asserts, only NPA-NXX's count), SBC's proposal is not infeasible, as Level 3 suggests. As SBC has explained, "[t]o effectuate . . . 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 that call as an intrastate interexchange call, intrastate access charges would apply – unless and until the FCC rules otherwise in its pending proceeding.” SBC Ex. 6.0 (Kirksey Direct) at 12-13.¹⁴

The Commission should reject Staff’s proposal. Staff recommends that the Commission “decide not to resolve IP-PSTN ‘VoIP’ issues in this proceeding,” because the FCC is currently considering such issues and the Commission may be “preempted” from addressing these issues. Staff Br. at 14. Staff is mistaken. While the Commission is preempted from establishing its own rules for IP-PSTN traffic, and from departing from the FCC’s current rules, the Commission is not preempted from ensuring that the agreement is consistent with the FCC’s current rules – which means the agreement should make clear that interexchange IP-PSTN traffic is not subject to reciprocal compensation, but instead is subject to access charges.

However, if the Commission rejects SBC’s proposed language (though there is no basis to do so under current federal law), then the Commission must not adopt *any* contract language regarding IP-PSTN or “IP-Enabled Services” traffic. Under no circumstances should the Commission adopt Level 3’s proposed language subjecting interexchange IP-enabled traffic to reciprocal compensation, and exempting it from access charges, because (1) that language is clearly inconsistent with section 251(b)(5) of the 1996 Act and the FCC’s current intercarrier compensation regime, and (2) as the *Vonage Preemption Order* makes clear, the Commission

¹⁴ Level 3 also proposes new “SS7 identifier” and “PIPU allocator” requirements for “IP-Enabled Services” traffic. Level 3 Br. at 120. These proposals should be rejected. New tracking methods for VoIP traffic should be developed by the industry, not imposed by Level 3 in a two-party arbitration.

does not have the authority to create new intercarrier compensation rules for this traffic. For the same reason, the Commission is without authority to create any other “interim” compensation regime for this traffic (such as bill and keep).

Finally, if the Commission does accept Staff’s proposal to “affirmatively decide not to resolve IP-PSTN ‘VoIP’ issues in this proceeding” (Staff Br. at 14), then the Commission must *reject* Staff’s proposals (1) to identify IP-PSTN VoIP traffic as a separate class of traffic in App. IC § 3.1 (IC Issue 1, Staff Br. at 13-14); (2) to modify SBC’s proposed § 16.1 “to specifically indicate that it does not apply to IP-PSTN ‘VoIP’ traffic” (Staff Br. at 15); and (3) to modify SBC’s proposed § 16.2 “to specify that it does not address IP-PSTN ‘VoIP’ traffic” (IC Issue 4, Staff Br. at 17). If the Commission were to adopt these Staff recommendations, it would have the unintended effect of making a *substantive* decision (and an incorrect one) that IP-PSTN traffic is *not* subject to access charges, and is *exempt* from the requirements that apply to all other interexchange traffic. Such a decision is precisely what Staff suggests the Commission *not* do. Thus, if the Commission adopts Staff’s proposal to affirmatively *not* address IP-PSTN traffic, then the Intercarrier Compensation Appendix should *literally* remain silent concerning PSTN traffic.¹⁵ It should be noted that an interconnection agreement silent on these issues would not leave the parties without any remedy, because it would not affect existing legal authorities and remedies (*e.g.*, the parties’ switched access tariffs and FCC rules). Presumably, the parties would avail themselves of any remedies in accordance with these other legal authorities should a dispute arise regarding payment for IP-PSTN traffic.

¹⁵ Thus, for instance, should the Commission adopt Staff’s proposal, then SBC’s Section 16.1 should be adopted, but should be modified to omit the reference to IP-PSTN traffic (“and/or (ii) originates from the end user’s premises in IP format and is terminated to the switch of a provider of voice communication applications or services when such switch utilizes IP technology and terminates over a Party’s circuit switch”).

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?

Level 3 asserts that SBC's proposed definition of "Section 251(b)(5) Traffic" is unlawful because (1) "Section 251(b)(5) applies to all telecommunications traffic, irrespective of where the calling and the called parties are physically located," and (2) "SBC seeks to reincorporate a geographic test that the FCC abandoned in its 2001 *ISP Remand Order*," where "the FCC expressly repudiated earlier rules that limited Section 251(b)(5) to 'local' traffic." Level 3 Br. at 89. Level 3 says nothing, however, about its own proposed language. Perhaps that is because Level 3 proposes to apply reciprocal compensation under section 251(b)(5) to "circuit switched Local Traffic" (L3 §5.2), while (1) Level 3's notion of "circuit switched" traffic is narrow, and comprises far less than "all telecommunications traffic" (*see* L3 § 3.4); and (2) Level 3 proposes to revive the terminology "Local Traffic" (L3 § 5.2) despite the fact that, as Level 3 notes, that is precisely the terminology "the FCC expressly repudiated" in the *ISP Remand Order*.

In any event, Level 3's assertions are without merit, as explained in SBC's opening brief. To summarize, in the *ISP Remand Order*, the FCC rejected use of the terminology "local" (Level 3's proposed terminology), and instead used the terminology "section 251(b)(5) traffic" (SBC's proposed terminology). *ISP Remand Order*, ¶¶ 8, 25, 45, 46, 89, 98. *See also Virginia Arbitration Order*, ¶¶ 313, 315 (ordering "that the term 'section 251(b)(5) traffic' be substituted for the term 'Local Traffic'").

Moreover, while the FCC rejected the terminology "local," it *affirmed* its prior holdings that section 251(b)(5) does not apply to all telecommunications traffic (as Level 3 suggests), but instead contains a geographic limitation (as SBC proposes). Specifically, the FCC held that

Section 251(b)(5) does not apply to the kinds of traffic listed in section 251(g), so that Section 251(b)(5) “does not mandate reciprocal compensation for ‘exchange access, information access, and exchange services for such access.’” *ISP Remand Order*, ¶ 34. The FCC also described this carve-out from section 251(b)(5) in geographic terms, holding that this carve-out applies to “all traffic” “that travel[s] to points – both interstate and intrastate – beyond the local exchange.” *Id.* ¶ 37. That is, section 251(b)(5) does not apply to traffic where the calling and called parties are physically located in different local exchanges, because such traffic, by definition, travels beyond the local exchange. This is precisely what SBC’s proposed language provides, and thus the Commission should approve that language.¹⁶ Staff also “recommends the Commission accept SBC’s proposed language for Appendix Intercarrier Compensation Section 3.2,” because “the Commission has consistently distinguished Section 251(b)(5) traffic from VNXX or FX-like traffic.” Staff Br. at 16.

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?

IC Issue 4 concerns the proper routing for interexchange traffic, including interexchange IP-PSTN and PSTN-IP-PSTN traffic. SBC discusses this issue further below under ITR Issue 11, where it explains that Level 3’s position is without merit. SBC explains under IC

¹⁶ Level 3 suggests that SBC’s language “is directed towards presupposing the results of the FCC’s deliberations in the *ISP Remand Order*.” Level 3 Br. at 89. That is not the case. While the D.C. Circuit remanded the *ISP Remand Order*, it expressly refused to vacate that order, and thus the *ISP Remand Order* remains effective federal law, as Level 3 admits (at 114 n.268). SBC’s language reflect this currently effective federal law, as SBC has explained.

Issue 2 why the Commission must reject Staff's proposal to modify SBC's proposed language "to specify that it does not address IP-PSTN 'VoIP' traffic." Staff Br. at 17.

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?

Level 3 asserts that the *ISP Remand Order*'s compensation plan applies to *all* ISP-bound traffic, even long distance calls to an ISP. Level 3 Br. at 98-106. Level 3 is incorrect and, as Staff agrees, "the Commission [should] accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.3." Staff Br. at 18.

As SBC explained in its opening brief, the "ISP-Bound Traffic" covered by the FCC's *ISP Remand Order* compensation plan is limited to traffic bound for an ISP located in the same local exchange in which the call originated. That is because that is the only ISP-bound traffic addressed by the *ISP Remand Order*: traffic bound to an ISP that previously had been characterized by certain state commissions (and certain courts) as "local" traffic subject to reciprocal compensation under Section 251(b)(5).

Level 3 incorrectly asserts that "the FCC made no distinction between local and non-local ISP-Bound Traffic." Level 3 Br. at 105. *See also id.* at 103-05 (same). To the contrary, the question the FCC addressed 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). The FCC did not address whether, for instance, a long distance call to an ISP should be treated as "local" traffic subject to section 251(b)(5), because there was never any doubt that such a call is still long distance, and is thus subject to access charges rather than reciprocal compensation. Moreover, non-local calls to

ISPs were not part of the problem the FCC was attempting to solve: “market distortions” resulting from “CLEC reciprocal compensation billings . . . for ISP-bound traffic.” *ISP Remand Order*, ¶ 5. CLECs were, of course, billing reciprocal compensation only for “local” ISP-bound traffic, not interexchange traffic destined to an ISP. Indeed, in its recent *Core Forbearance Order*, the FCC described its *ISP Remand Order* compensation plan as “an exception to the *reciprocal compensation* requirements of the Act for calls made to ISPs *located within the caller’s local calling area.*” *Core Forbearance Order*, n.25 (emphases added).

In short, interexchange calls to an ISP are still interexchange calls. Thus, for the same reasons SBC explained in its opening brief with respect to this issue and the FX traffic issue (IC Issue 11), an FX call to an ISP is not a “local” call, and is not subject to reciprocal compensation or the *ISP Remand Order*’s compensation plan. FX calls to an ISP are not delivered “to an ISP in the same local calling area” (*ISP Remand Order*, ¶ 13) or “to ISPs located within the caller’s local calling area” (*Core Forbearance Order*, n.25), but are delivered to an ISP in a *different* local calling area. That is, FX calls are *interexchange* calls, as SBC has explained.¹⁷

Indeed, the Commission has repeatedly rejected Level 3’s position here, and has repeatedly found that FX traffic, including ISP-bound FX traffic, is not subject to reciprocal compensation or the *ISP Remand Order*’s compensation plan. *See In re AT&T Comms. of Illinois, Inc.*, Arbitration Decision, Docket No. 03-0239, 2003 WL 22518548, at *99-100, 102-03 (ICC Aug. 26, 2003). As Staff notes, “the Commission has distinguished between ISP-bound and VNXX or FX-like ISP-bound traffic.” Staff Br. at 17-18. Level 3 provides no sound basis

¹⁷ Level 3 suggests that SBC’s proposal is inconsistent with SBC’s own testimony that “the FCC Plan rate of \$0.0007 properly applies to all ISP-Bound Traffic.” Level 3 Br. at 97 (quoting SBC Ex. 7.0 (McPhee Direct) at 26). Level 3’s suggestion is ludicrous. SBC’s testimony asserted that the *ISP Remand Order* applies to all “ISP-Bound Traffic” – a term that is capitalized because SBC expressly defines that term, and defines it to include only “local” ISP-bound traffic (as SBC’s testimony and proposed contract language make clear).

for the Commission to depart from its prior decisions. Moreover, other state commissions have reached the same conclusion. The Wisconsin commission, for instance, has also repeatedly concluded that FX traffic is not subject to reciprocal compensation under Section 251(b)(5). *See* Order, Case No. 05-MA-120, at 131-34 (Pub. Serv. Comm'n of Wisconsin) (determining that FX traffic is not local traffic subject to reciprocal compensation); Order, Case No. 05-MA-123, at 90-91 (Pub. Serv. Comm'n of Wisconsin, March 12, 2001) (same).

Level 3 also takes issue with SBC's proposal to apply "bill and keep" to ISP-bound FX traffic, pointing out that "[i]n the *Core Forbearance Petition* Order, the FCC made clear it was revoking prior decisions that allowed ILECs to establish 'bill and keep' arrangements for new markets and for traffic that exceeded growth caps." Level 3 Br. at 99. *See also id.* at 97-99 (same). But SBC does not rely on those portions of the *ISP Remand Order*; as SBC has explained, FX traffic bound to an ISP, like all other interexchange traffic bound to an ISP, is simply not the subject of the *ISP Remand Order*'s compensation plan.

Moreover, this Commission determined more than four years ago that it would not require payment of compensation for FX traffic, including FX traffic that is ISP-bound, and instead adopted a bill-and-keep regime for all such traffic. And the ICC has reaffirmed that policy on at least six occasions, most recently in the AT&T/SBC Illinois arbitration.¹⁸ Level 3 provides no reason to depart from these prior decisions. Indeed, all Level 3 can muster is to point out that (1) in one of its prior decisions, the Commission agreed with a Texas decision

¹⁸ *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); *In re AT&T Comms. of Illinois, Inc.*, Arbitration Decision, Docket No. 03-0239, 2003 WL 22518548, at *99-100, 102-03 (ICC Aug. 26, 2003).

noting that imposing bill and keep for FX traffic is “consistent with the FCC’s determination that bill-and-keep is appropriate for carriers that have entered new markets for ISP traffic”; and (2) in the *Core Forbearance Order*, the FCC determined that it would forbear from enforcing the *ISP Remand Order*’s new markets rule. Level 3 Br. at 108-09. Level 3’s argument is without merit. The *ISP Remand Order*’s new markets rule was not the legal basis for the Commission’s prior decisions, nor was “consistency” with the new markets rule the basis for those decisions. As Staff states, the Commission “ordered bill and keep for FX-like or VNXX traffic based on its policy goals of: (1) preserving the consumer benefits that coincide with the use of FX-like or VNXX arrangements and (2) preventing one LEC from subsidizing the FX-like or VNXX like offerings of another LEC.” Staff Br. at 26. Moreover, “[t]hese policy goals are just as appropriate today as they were when the Commission made its previous findings,” and “nothing in the FCC’s recently released Core Forbearance Order requires the Commission to alter its previous determinations on these issues.” *Id.*¹⁹

Level 3 also refers to the FCC’s *Starpower Order*. Level 3 Br. at 105-06. That Order is inapplicable here. As Level 3 itself notes (*id.*), that Order addressed a dispute concerning whether compensation was due for certain FX traffic under the terms of the carrier’s interconnection agreement. The FCC stated “that it did not specifically address the legal question of whether incumbent LECs have an affirmative obligation under sections 251(b)(5) and 252(d)(2) of the Act to pay reciprocal compensation for virtual NXX traffic.” *Id.* That is,

¹⁹ If the Commission were to depart from its prior compensation scheme, then access charges would have to apply to all FX traffic (including FX traffic bound to an ISP), because such traffic is interexchange traffic, and not local traffic subject to reciprocal compensation or the FCC’s *ISP Remand Order* plan.

the FCC expressly stated that that Order does not address the question at issue here: whether, as a legal matter, section 251(b)(5) applies to FX traffic.

Level 3's reliance on the FCC Wireline Competition Bureau's *Virginia Arbitration Order* is similarly misplaced. *See* Level 3 Br. at 106. That decision too did not address the *legal* issue of whether FX traffic is subject to reciprocal compensation under Section 251(b)(5), but instead rejected Verizon's proposal to rate calls "according to their geographical end points" because Verizon did not present a "workable solution[]" for rating traffic in such a manner. *Virginia Arbitration Order*, ¶ 301. As this Commission concluded the last time it faced the same issue, "the Virginia Arbitration Decision does not provide support for [Level 3's proposal]. In the Virginia Arbitration Decision, the FCC did not rule that the CLEC was correct [that traffic should be rated by NPA-NXX, without regard to the geographical end points], but rather that Verizon's proposal . . . was unworkable." *In re AT&T Comms. of Illinois, Inc.*, Arbitration Decision, Docket No. 03-0239, 2003 WL 22518548, at *103 (ICC Aug. 26, 2003). Here, however, "SBC's proposal is workable." *Id.*²⁰

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?

This issue also 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 Staff concludes, "Level 3's proposal is overly restrictive" and should be rejected (Staff Br. at 19), while the

²⁰ Level 3 also asserts that SBC's costs are the same for local and FX calls, because in both cases SBC delivers the call to the POI, and thus the two should be subject to the same intercarrier compensation rate. Level 3 Br. at 102 & 107. SBC refuted that assertion in its opening brief (at 14). SBC also refuted (in connection with IC Issue 5) Level 3's reliance on footnote 82 of the *ISP Remand Order*, which addresses the definition of "information access," not the scope of the ISP-bound traffic covered by that order. *See* Level 3 Br. at 113.

Commission should approve SBC’s proposed “Section 251(b)(5) Traffic” terminology (*id.* at 16). *See also* Staff Br. at 22 (“Staff recommends the Commission accept SBC’s proposal to reference the term ‘Section 251(b)(5) Traffic’”).

Level 3 repeatedly asserts that SBC’s proposed term “Section 251(b)(5) Traffic” is “undefined.” Level 3 Br. at 114. Level 3 is wrong. SBC proposes to expressly, and concretely, define the term “Section 251(b)(5) Traffic” in Section 3.2. (Indeed, that proposed definition is directly at issue under IC Issue 3.) As Staff states, “the jurisdictional definition ‘251(b)(5) traffic’ is certainly not a new creation – it finds its origin in the [*ISP Remand Order*],” and “[t]he FCC uses this term repeatedly in [*the ISP Remand Order*].” Staff Br. at 22.

Level 3 also asserts that “SBC[] attempts to impose access charges on any traffic that may fall under SBC’s undefined ‘Section 251(b)(5) Traffic’ definition.” Level 3 Br. at 114. That assertion too is inaccurate. SBC proposes using the term Section 251(b)(5) Traffic to define the telecommunications traffic that is subject to reciprocal compensation under section 251(b)(5), not the traffic that is subject to access charges.

With the exception of these two additional misstatements by Level 3, Level 3’s brief says nothing on IC Issue 6 that SBC did not address in its opening brief on this issue, and in this reply brief with respect to IC Issues 2 and 3, above, where SBC explains that SBC’s terminology is consistent with governing FCC orders while Level 3’s is not.

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?

IC Issue 7(A). Level 3’s asserts that SBC’s proposed language should be rejected, and Level 3’s adopted, because SBC’s proposed language “forces Level 3 to pay access charges on

underlying telephone number is associated with IP originated calls, and that is the information that SBC seeks. Moreover, Level 3 admitted at hearing that CPN is “part of the information that [it] ha[s] when a call is originally passed to Level 3,” and that while “IP protocol doesn’t transmit it in the same way as SS7 would; but generally we do have that information [CPN] and it is passed along.” Tr. 232. Thus, there is no excuse for Level 3 not to provide CPN for such traffic.

- 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?**

Level 3’s brief says nothing on this issue that SBC did not address in its initial brief.

Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth there.²¹

- 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*?**

²¹ SBC would add that Level 3’s assertion that “there is no legal basis for creating a new dispute resolution process aimed specifically at ISP-Bound traffic” (Level 3 Br. at 123) is a red herring. SBC, like Level 3, proposes to apply the same process to ISP-Bound Traffic and traffic subject to reciprocal compensation. The issue here is whether, as Level 3’s language provides, the agreement’s dispute resolution process should apply to traffic not even covered by the agreement. It should not.

(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?

IC Issue 10(A). This issue, in part, again concerns SBC's proposal to use the term "Section 251(b)(5) Traffic." Once again, Level 3 asserts that this term is "undefined" and that SBC seeks "to impose access charges on whatever traffic SBC determines would fall under the penumbra of its undefined 'Section 251(b)(5) Traffic' term." Level 3 Br. at 115. As SBC explains above under IC Issue 6, Level 3 is mistaken on both counts. And, as explained in SBC's initial brief and this reply brief with respect to IC Issue 2 and 3, SBC's proposed terminology is consistent with governing FCC orders, while Level 3's is not. *See also* Staff Br. at 16, 19, 22 (recommending the Commission adopt SBC's "Section 251(b)(5) Traffic" terminology).

IC Issue 10 also concerns Level 3's proposed section 5.2.3, where Level 3 proposes that "[t]he Parties shall compensate each other for Total Reciprocal Compensation Traffic at \$0.0005 per minute of use." In section 5.2, Level 3 proposes to define Total Reciprocal Compensation Traffic as all "circuit switched Local Traffic" and "ISP-Bound Traffic." As SBC has explained, Level 3's proposed language for section 5 (*e.g.*, its "Local Traffic" terminology) is inappropriate, and the Commission should instead use SBC's proposed language in section 5, including SBC's section 251(b)(5) Traffic terminology. Staff agrees. Staff Br. at 22, 25. However, Staff "recommends that the Commission accept Level 3's proposed rate of \$0.0005." *Id.* at 24. So

long as the Commission does not adopt Level 3's proposal to subject interexchange IP-Enabled Services (including IP-PSTN) and FX traffic to reciprocal compensation (which would be unlawful), SBC will agree to accept Level 3's and Staff's proposed reciprocal compensation rate of \$0.0005 (though SBC does not necessarily agree with their arguments in support of that rate).

IC Issues 10(B), 10(C), 10(D), 10(E). Level 3 does not even attempt to explain why it opposes SBC's language. *See* Level 3 Br. at 115. As SBC has explained, the language at issue here does not even apply to ISP-Bound Traffic, because SBC has elected to use the *ISP Remand Order's* compensation plan. Moreover, the language at issue here applies to section 251(b)(5) Traffic *only if* Level 3 does not opt to take advantage of the FCC's "mirroring" rule. As Staff explains, because SBC has elected the *ISP Remand Order's* plan for ISP-Bound Traffic, "with respect to the FCC's framework the ball is in Level 3's court." Staff Br. at 23. Staff suggests that these issues may be "moot" if a "unified compensation regime" for ISP-Bound and Section 251(b)(5) Traffic is used. *Id.* at 24. However, because Level 3 has failed to indicate whether it wishes to accept or to reject SBC's offer to exchange Section 251(b)(5) and ISP-Bound Traffic at the same rate, these issues are not moot. If Level 3 does not choose to accept SBC's offer to mirror ISP-Bound Traffic and Section 251(b)(5) Traffic reciprocal compensation rates, SBC's proposed language at issue here would apply, for the reasons SBC explained in its opening brief. SBC notes that Level 3 has not articulated any coherent objection to this language. Accordingly, the Commission should adopt SBC's proposed language.

Transit Traffic (Appendix IC, L3 § 5.2.2).²² Level 3 proposes to include language in the parties' Appendix IC addressing intercarrier compensation for "Transit Traffic." SBC discusses this issue fully under ITR Issues 5 through 9, where SBC explains that transiting is not required by the Act and is thus not subject to arbitration under section 252 of the Act. Level 3's proposals concerning transiting therefore should not be included in the parties' interconnection agreement. Staff agrees. Staff Br. at 43-44.

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?

IC Issue 11(A). This issue concerns how one determines whether a call, particularly including an FX call, is local or interexchange in nature. As Staff notes, "[t]his issue [concerning FX traffic] has been addressed repeatedly by the Commission and the Commission

²² 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.

has repeatedly determined that bill and keep should apply.” Staff Br. at 26. “[N]othing in the record differentiates the situation here from those in which the Commission made its previous determinations and there is nothing that should cause the Commission to alter its previous findings.” *Id.* at 28.

Level 3 says very little about this issue, but chiefly refers to the *ISP Remand Order*, asserting that a “call need not terminate in the local calling area in order to be deemed an ISP-Bound call.” Level 3 Br. at 116. As SBC explained in its discussion of IC Issue 5, Level 3 is incorrect; the *ISP Remand Order*’s compensation plan applies only to traffic delivered to an ISP in the same local calling area in which the call originated.

Moreover, even if Level 3 were correct that the *ISP Remand Order*’s compensation plan applies to *all* ISP-bound traffic, including ISP-bound FX calls, that would leave an open question concerning FX calls that are *not* ISP-bound. With respect to *non*-ISP-bound FX calls, Level 3 merely asserts that prior “industry standards call for the rating of a call to be based upon the NPA-NXX of the calling parties.” Level 3 Br. at 116. That is irrelevant. While NPA-NXXs 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, as a legal matter calls are local or not local based on the geographical endpoints of the call. *See ISP Remand Order*, ¶ 37 (“all traffic” “that travel[s] to points . . . beyond the local exchange” is interexchange traffic subject to access charges, not reciprocal compensation).

IC Issue 11(B). Level 3 asserts that SBC’s proposed language should be rejected, and Level 3’s adopted, because interexchange “IP-Enabled Services” traffic is not subject to access charges. Level 3 Br. at 117. That assertion is refuted above, and in SBC’s initial brief, under IC Issue 2.

(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?

This issue is simple. The *ISP Remand Order* remains effective federal law, and thus the parties' agreement must reflect that Order. SBC's proposed contract language is the only contract language that does this, and it should therefore be adopted.

As noted above under IC Issue 10, SBC will agree to accept Level 3's and Staff's proposed *rate* of \$0.0005 for the exchange of Section 251(b)(5) and ISP-Bound Traffic.²³ However, with the exception of the actual rate, SBC's proposed contract language, and not Level 3's, should be adopted. It is true that if Level 3 accepts SBC's offer to mirror section 251(b)(5) and ISP-Bound Traffic rates, the same rate will apply to both. But ISP-Bound Traffic is still not subject to "reciprocal compensation" under section 251(b)(5), as Level 3's proposed language suggests. Rather, the *ISP Remand Order* establishes a separate intercarrier compensation scheme for ISP-Bound Traffic, and distinguishes that traffic from traffic subject to section 251(b)(5). The parties' contract should reflect that distinction.

²³ SBC would not agree to that rate, however, if the Commission were (unlawfully) to apply reciprocal compensation to interexchange IP-Enabled Services or IP-PSTN traffic, or to FX traffic.

Level 3's proposal that the Commission "make clear that the current ISP Compensation terms [in the parties' current contract] will remain in place" (Level 3 Br. at 118) is unlawful, because those current terms do not reflect the legal changes wrought by the *ISP Remand Order*. As Staff concludes, "the Commission should reject any proposal by Level 3 to ignore existing FCC rules regarding intercarrier compensation for [ISP-Bound Traffic]." Staff Br. at 28.

Level 3 notes (at 118) that in the *Core Forbearance Order*, the FCC decided to forbear from enforcing the *ISP Remand Order*'s new markets and growth cap requirements. *See also* Staff Br. at 29-30. As SBC explained in its opening brief on this issue, SBC agrees that those aspects of the *ISP Remand Order* need no longer be reflected in the parties' agreement. The *Core Forbearance Order*, however, does not affect the remainder of the *ISP Remand Order*, including, for instance, the 3:1 presumption. Thus, those aspects of the *ISP Remand Order* must be reflected in the parties' contract. SBC's language does this, while Level 3's does not. Accordingly, the Commission should adopt SBC's proposed language. Staff agrees. Staff Br. at 31-33.

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?

Level 3 asserts that its proposed section 7.1 should be adopted, and SBC's rejected, because interexchange IP-PSTN traffic is not subject to access charges. Level 3 Br. at 91. As SBC has explained, Level 3 is wrong. In any event, Level 3's argument has nothing to do with the contract language at issue here (section 7.1). That language does not address IP-Enabled or IP-PSTN traffic, but addresses the scope of traffic excluded from section 251(b)(5) under the

“SBC desires to be specifically named in the disputed language” – as if EMI is a format SBC dreamed up and foisted upon a hapless Level 3. Level 3 Br. at 122. That is not at all true. EMI was developed in an industry forum that is open to all interested parties, and it is the format that is used and has been used throughout the industry. SBC Ex. 9.0 (Read Direct) at 5. The contractual reference to EMI appears in the *agreed* portion of the contract language at issue, and Level 3 admits (at 122) it has no “particular different format” to propose. The Commission should disregard Level 3’s rhetorical attempt to portray EMI as anything other than the industry-standard, Level-3-agreed format that it is.

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?

IC Issue 18(B) concerns “8YY” traffic, destined for businesses with toll-free prefixes like the familiar “800” number. Contrary to Level 3’s rhetoric (Level 3 Br. at 92), SBC does not seek to create a “vast new” compensation methodology. Instead, SBC’s proposal is consistent with the time-honored principle that long-distance access traffic is subject to access charges (not reciprocal compensation) and recognizes the undisputed fact that the vast majority of 8YY traffic is long-distance access traffic. After all, a business buys an “800” number so customers can call it from a long distance without paying toll charges; it would make no sense to pay for 800 service if callers were making free local calls anyway.

Level 3 contends that reciprocal compensation should apply if a particular 8YY call “looks” local – that is, if the NPA-NXX of the caller appears to be in the same local calling area as the business it is calling, if the 8YY number is “translated” into a traditional NPA-NXX. But that approach elevates form (what the phone number looks like) over real-world substance (where the calling parties actually are). And as SBC has shown, NPA-NXX codes can be lost,

deleted or even modified by a carrier so as to make long-distance calls appear local and evade access charges. SBC Ex. 1.0 (Albright Direct) at 38-42. Thus, Level 3's proposal invites gaming.

Level 3's contention (at 92) that reciprocal compensation would apply if an SBC end user called a Level 3 end user "across the street" is irrelevant on multiple levels: (i) there is no evidence that any material percentage of 8YY calls goes only across the street, (ii) one would not expect a business to set up and pay for an 8YY if number if its customers were situated across the street, and (iii) Level 3 is not seeking to apply reciprocal compensation based on the *actual* location of the caller and the called party, but on the *apparent* location based on NPA-NXX codes, which can be manipulated. The Commission should reject Level 3's proposal.

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?

As with Issue 18(A), Level 3 does not dispute the current industry standards for the exchange of information between carriers, and does not propose any concrete alternatives. Instead, Level 3 wants the parties' agreement to include language that permits them to "explore additional options." But if the parties want to explore different formats, they are always free to do so, whether or not their contract expressly contemplates that possibility. Accordingly, Level 3's proposal is unnecessary; further, any suggestion that the exploration of different formats is *required* would be improper.

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

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

Level 3 does not separately address IC Issue 19(B) or 19(C), as posed by SBC. Thus, Level 3 does not dispute the controlling points that Meet Point Billing (where the parties share access revenues from a third carrier) cannot be applied to all “Circuit Switched Traffic” (because not all circuit switched traffic involves a third carrier), but must be limited to “Switched Access” traffic, where the parties share access revenues and where Meet Point Billing is applicable.

Level 3 only addresses its proposals for IP-enabled traffic, which SBC has refuted above.

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?

IC Issue 20(A). Level 3 asserts that intraLATA toll access charges should apply *only* to “Circuit-Switched Traffic,” as Level 3 defines that term, and exclude all other intraLATA traffic, including IP-PSTN traffic. Level 3 Br. at 94. As SBC explained above under IC Issue 2, Level 3’s proposal to exempt interexchange IP-PSTN traffic (and any other, non-“IP-Enabled” traffic that does not satisfy Level 3’s definition of “Circuit-Switched Traffic”) from access charges should be rejected.

IC Issue 20(B). Level 3’s brief does not even address this issue. Rather, the only aspect of section 14.1 (the contract language at issue under IC-20) that Level 3 addresses is its proposal to overhaul the intraLATA toll access charge regime so that such charges would apply only to

“Circuit-Switched Traffic,” and to exclude all other intraLATA interexchange traffic (including intraLATA interexchange IP-PSTN traffic). *See* Level 3 Br. at 94. However, regardless of the Commission’s decision regarding IP-PSTN traffic, the Commission should still adopt SBC’s proposed language on this issue. Whatever the scope of traffic to which interLATA toll access charges apply, Level 3 should not be allowed to apply charges greater than those charged by SBC, for the reasons SBC explained in its initial brief. Level 3 has not even attempted to support its objection to SBC’s proposed language, and thus the Commission should resolve this issue in favor of SBC.

IC Issue 20(C). As SBC explained in its initial brief, the Commission should reject Level 3’s proposed language in section 14.1 regarding the circumstances under which Level 3 can charge the tandem rate for intraLATA toll traffic. Level 3 does not even address, much less attempt to support, its proposed language in its opening brief. Rather, Level 3 merely refers to its position regarding IP-Enabled Traffic (Level 3 Br. at 94), which has nothing to do with the particular language at issue in IC-20(C). Accordingly, regardless of the Commission’s decision regarding IP-Enabled Traffic, the Commission should resolve this issue in favor of SBC.

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?

Issue 21(A) and 21(C). Level 3’s brief on this issue merely refers to Level 3’s argument that interexchange “IP-Enabled Traffic” is “not subject to any access charges,” and that only

wants to be properly compensated for local, intraLATA exchange access, and interLATA exchange access traffic, and that Level 3's proposal to commingle traffic on a single trunk group would make that extremely difficult, if not impossible (*see* ITR Issue 11(A)). But SBC's argument that the interconnection agreement should not address certain types of traffic (for example, transit traffic and interexchange access traffic) is based on the law – in particular, the plain language of the 1996 Act and FCC orders implementing the Act. Specifically, SBC's position relies on the indisputable facts that transiting is not required by sections 251/252, that interexchange access traffic is not within the scope of those provisions (indeed, it is expressly exempted therefrom by section 251(g)), and that those provisions create no rights on the part of interexchange carriers and impose no duties on incumbent local exchange carriers vis-à-vis such interexchange carriers.

In addition, SBC's argument that Level 3 cannot lawfully be permitted to carry interexchange access traffic over local interconnection trunks, but instead must carry it over access trunks is based on existing federal law – *i.e.*, SBC's federal access tariffs, which have the full force and effect of federal law. *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (“once a carrier's tariff is approved by the FCC, the terms of the federal tariff are considered to be “the law””); *American Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996) (“[F]ederal tariffs have the force of law and are not simply contractual.”); *MCI Telecomm. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992) (“[F]ederal tariffs are the law, not mere contracts.”); *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966) (“[A] tariff, required by law to be filed, is not a mere contract. It is the law.”). SBC's proposal does not (nor could it be reasonably construed to) presuppose the outcome of the *ISP Remand*

Order. It simply seeks to implement the current law. This is explained fully in SBC's discussion of ITR Issue 11(A).

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?

Level 3's brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11(A) in its initial brief. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion. Staff raises a concern (Br. at 42-43) that SBC's proposed language might "prevent Level 3 from passing *permissible* traffic – such as section 251(b)(5) traffic – over local interconnection trunk when Level 3 acts as a transiting provider or as a wholesale provider for another retail provider," or may even "require Level 3 to cease exchanging traffic with SBC *entirely*." That is not the case. SBC's proposed language is intended to prevent Level 3 from commingling interexchange access traffic with local traffic on local interconnection trunk groups – which even Staff agrees (Br. at 43-44) Level 3 should not be permitted to do.

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

Level 3's brief on the transiting issue ponders the consequences of SBC not providing transiting service, claiming among other things that it would impose "costs and disruptions associated with building out duplicative and unnecessary interconnection trunks to every ILEC and CLECs." Level 3 Br. at 125. But that is not the issue here. SBC is not attempting to withdraw its transiting services, nor is it 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 obligate SBC to continue to provide transiting at the same rates that currently

apply.²⁴ See SBC Ex. 7.0 (McPhee Direct) at 23-24. For that matter, SBC is not even contending the Commission is without authority to regulate transit traffic. 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. Staff agrees. Staff Br. at 43-44. Level 3 nevertheless argues – contrary to its own witness’s admission – that transiting is a form of interconnection required by section 251(a) and (c) of the Act, but that argument fails. Level 3 also posits policy arguments, but each policy argument, in addition to being irrelevant in light of the controlling law, is premised on the incorrect assumption that SBC will stop providing transit service if not required to do so pursuant to the parties’ interconnection agreement.

Level 3’s legal arguments are without merit. Despite its own witness’s admissions 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), Level 3 argues in its initial brief that transiting is a form of “indirect interconnection” required under section 251(a)(1) of the Act and is part of the ILECs’ duty under section 251(c)(2) to “interconnect[] at any technically feasible point for the exchange of traffic.” Level 3 Br. at 129-30. Level 3 is wrong.

We demonstrate below that transiting is required neither by section 251(a)(1) nor by section 251(c)(2). First, however, we emphasize a point that we made but did not stress in our initial brief (at p. 146): Even if transiting were required by section 251(a)(1), terms and conditions for transiting still would not be subject to the negotiation or arbitration requirements

²⁴ The voluntary commercial agreement to which SBC has committed provides for transiting at the current Commission-approved, TELRIC-based MOU rate for the first 8 million minutes per month, after which rates would increase modestly.

of section 252. Section 251(c)(1) of the 1996 Act identifies the matters that incumbent LECs are required to negotiate with requesting carriers: “the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection [(c)].” Thus, the duties enumerated in 251(b) and section 251(c) must be negotiated, but not the duties enumerated in section 251(a). And section 252(b) plainly contemplates arbitration only of those matters that must be negotiated. Thus, the question whether section 251(a)(1) requires transiting is purely academic, because even if it did, terms and conditions governing transiting still would not be subject to arbitration.

In any event, section 251(a)(1) does not require transiting. In its discussion of section 251(a)(1), Level 3 holds forth at length about statutes meaning what they say and how statutes must be interpreted according to their plain language (Level 3 Br. at 130), but Level 3 then violates that principle by arguing that section 251(a)(1) requires SBC to provide “indirect interconnection between carriers.” Transiting is not a form of indirect interconnection that SBC is required to provide *other carriers* under section 251(a)(1), as the plain terms of that section make clear. Section 251(a)(1) requires each telecommunications carrier “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. § 251(a)(1). It does not require any carrier to act as a middleman to “*provide* indirect interconnection between [two other] carriers,” as Level 3 asserts. Level 3 Br. at 130 (emphasis added).

Level 3 asserts that this “indirect interconnection” requirement mandates that SBC 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 – as even Level 3 eventually admits. Level 3 Br. at 127 (“transit is a form of indirect interconnection between Level 3 and other

carriers”). 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.)

Contrary to Level 3’s description, the “indirect interconnection” requirement works like this: Assume Level 3 wants to interconnect with Carrier X. Under section 251(a)(1), Carrier X then has the duty “to interconnect directly or indirectly” with Level 3. So if Level 3 wants to establish a direct interconnection, Carrier X must permit that direct interconnection. Assume, however, that Level 3 is already directly interconnected with “Carrier Z,” and Level 3 and Carrier Z have a *voluntary* arrangement whereby Carrier Z will transit traffic for Level 3. In that case, Carrier X is required by section 251(a)(1) to allow Level 3 to “indirectly interconnect” with it through Carrier Z. That is, Carrier X cannot refuse to interconnect with Carrier Z on the ground that Carrier Z is only transiting traffic for Level 3, or refuse to accept traffic that Carrier Z is transiting for Level 3 on the ground that Level 3 should be required to directly interconnect. But, again, section 251(a)(1) imposes no requirement on Carrier Z to act as a transiter.²⁵

Similarly, section 251(c)(2), by its plain terms, imposes an obligation on SBC only to interconnect *its* network with another carrier’s network – not to provide a bridge between the

²⁵ Moreover, it should be noted that section 251(a)(1) applies to *all* “telecommunications carriers,” not just all ILECs or even all LECs. There is no indication that Congress intended section 251(a)(1) to require each telecommunications carrier in the nation to provide transiting service upon demand of any other telecommunications carrier. Level 3’s interpretation of this section, if adopted by the Commission, would allow any telecommunications carrier in Illinois to demand that any other carrier in Illinois provide transiting service. For example, AT&T or SBC or Verizon could demand that Sprint or MCI or Citizens Telecommunications Company provide transiting to and from any third party carrier with which the latter is interconnected.

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,” 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 whether or not SBC provides transiting, which has nothing to do with physically interconnecting Level 3’s and SBC’s networks. In fact, in the *Local Competition Order*, the FCC foreclosed any contention that an incumbent carrier’s duty to provide interconnection 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. Transiting is the transport of traffic.

Level 3 argues that section 251(c)(2) requires that “the parties exchange all traffic regardless of origination or termination,” and therefore requires SBC to provide Level 3 “with interconnection to its network so that Level 3 may exchange transit traffic with third parties also connected to SBC.” Level 3 Br. at 130. That is a distortion of what the 1996 Act says. As explained above, SBC’s obligation under section 251(c)(2) is to provide *interconnection* between (*i.e.*, the physical linking of) SBC’s network and the requesting local exchange carrier’s (here, Level 3’s) network – there is no obligation to transport or terminate traffic between two other carriers. Moreover, section 251(c)(2) does not require interconnection for the transmission and routing of *all* traffic, as Level 3 suggests; rather, it requires interconnection for the “transmission and routing of telephone exchange and exchange access” traffic. And the FCC has held that an IXC seeking interconnection for purposes of originating or terminating its *interexchange* traffic

(as Level 3 seeks here) is not seeking interconnection for the transmission and routing of “telephone exchange service” or “exchange access.” *Local Competition Order*, ¶ 191.

Level 3 suggests that SBC should be required to continue providing transiting pursuant to an interconnection agreement because it has done so in the past. Level 3 Br. at 125. 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 arrangement. SBC Ex. 1.0 (Albright Direct) at 60-62. 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).

Level 3 also asserts that, in the *FCC Virginia Arbitration Order*, the FCC’s Wireline Competition Bureau “expressly directed the parties to include language in the interconnection agreement . . . that the ILEC must provide transit services to the CLECs.” Level 3 Br. at 129. This is a grotesque distortion of the WCB’s decision, because the *Virginia Arbitration Order* simply did not address the question whether an ILEC is legally obligated under the 1996 Act to provide transiting. Rather, in that arbitration, *both* the ILEC (Verizon) and the CLECs *agreed* to include transiting in the agreement, and the WCB was faced only with the task of choosing the most appropriate transiting language. In fact, the WCB expressly “*decline[d]* . . . to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service,” and also

declined to determine whether there is any such duty under section 251(a)(1). *Virginia Arbitration Order*, ¶ 117. Here, however, SBC does *not* agree to include transiting in the interconnection agreement, so the Commission is squarely faced with the legal issue that the WCB did not address in the *Virginia Arbitration Order*.

Level 3 also argues that various state commission decisions and rules support its position that transiting is a section 251 obligation. To begin with, another state commission's *rules* are irrelevant to the Commission's decision in this arbitration. In fact, if transiting really is a section 251 obligation, there would be no need for a state commission to promulgate its own rules requiring transiting, as Level 3 claims the Public Utilities Commission of Ohio has done (Level 3 Br. at 137). Indeed, SBC is not contending, and its position does not imply, that this Commission cannot regulate transiting by rule. Again, the point is simply that transiting is not subject to arbitration because it is not required by section 251(c). Moreover, the *Verizon California* decision cited by Level 3 (at 136) did not even address the issue presented here. Rather, like the parties in the *Virginia Arbitration Order*, the parties to that proceeding apparently voluntarily agreed to include transiting in the agreement, and the California Commission simply resolved their dispute over particular transiting terms, without ever reaching (or being asked) the question whether transiting is required by the Act. As for any other state commission decisions, those decisions are not binding precedent, and to the extent (if any) they actually held that transiting is arbitrable because it is required by section 251(c)(2), they were wrongly decided.

Staff agrees that terms and conditions governing transiting service should not be included in an interconnection agreement because such service is not required by the Act. Staff. Br. at 43-44. As Staff correctly points out, the "parties agree that SBC is not specifically required to

provide transit service according to FCC rules.” *Id.* at 43. Nevertheless, Level 3 “can obtain transit service through SBC’s Illinois tariffs, despite the fact that FCC rules do not specifically require SBC to provide such service.” *Id.* at 43-44.

Level 3’s policy arguments are irrelevant and without merit. As Staff correctly observes, “Potential public policy concerns that might result from SBC’s failure to provide transit service are essentially irrelevant, inasmuch as SBC makes such service available.” Staff Br. at 43. “SBC has a currently effective transit offering in its Illinois tariffs,” and “Level 3 therefore can obtain transit service through SBC’s Illinois tariffs, despite the fact that FCC rules do not specifically require SBC to provide such service.” *Id.* at 43-44. Moreover, even if SBC did not provide transiting via tariff, Level 3’s policy arguments would still be irrelevant. Once one determines that the 1996 Act does not require transiting, that is the end of the matter. It makes no difference if one then determines, for policy grounds, that Congress should have required transiting.

Level 3’s policy arguments are without merit in any event. First, Level 3 argues that if SBC is not required to provide transiting pursuant to the parties’ interconnection agreement, Level 3 will be required “to build expensive, but little used networks.” Level 3 Br. at 129. That is not true. SBC is not proposing to withdraw its transiting service, so Level 3 will not be forced to immediately establish interconnection arrangements with other carriers. Rather, SBC will continue to offer transit service pursuant to tariff and pursuant to separate stand alone commercial agreements. SBC Ex. 1.0 (Albright Direct) at 61-62; SBC Ex. 7.0 (McPhee Direct) at 23-24. Moreover, SBC’s proposal does not force Level 3 to establish direct connections with other carriers when volumes do not warrant such connections. To the contrary, the transit traffic agreement that SBC offers clearly defines the threshold at which Level 3 would be required to

establish a separate direct trunk for traffic exchanged between Level 3 and a third party carrier. SBC Ex. 1.0 (Albright Direct) at 61-62. Once Level 3 is exchanging traffic with another carrier at that threshold (the same threshold that even Level 3 advocates (*see* Level 3 Br. at 133 and Level 3 proposed language for section 4.3 of the ITR Appendix)), it is appropriate for Level 3 and the other carrier to enter into a separate agreement and cease to rely on SBC's network. *Id.* Thus, under SBC's proposal, Level 3 would be required to establish direct connections only where traffic volumes – even in Level 3's estimation – warrant it.

Second, Level 3 argues (Level 3 Br. at 131) that it would be more efficient for SBC to carry transit traffic for Level 3 because SBC is connected to all carriers. SBC does not dispute that it may be more efficient for SBC to carry transit traffic for two carriers under some circumstances – which is why SBC voluntarily agrees to provide transiting for carriers until traffic exchanged between them reaches a certain level. SBC Ex. 1.0 (Albright Direct) at 61-62. But the fact that it might be more efficient for SBC to carry such traffic does not support Level 3's argument that SBC must provide transit service *pursuant to an interconnection agreement*. Instead, SBC must be permitted to provide that service pursuant to tariff and separate agreement.

Third, Level 3 argues that SBC will not be financially harmed – and purportedly will fully recovery its costs – if required to continue providing transit service pursuant to interconnection agreement. Level 3 Br. at 128. There is no evidence to support that claim. In fact, Level 3's own proposed contract language suggests that a carrier likely would not recover its costs of transiting under the prices SBC charges for that service. Specifically, in the situation where Level 3 provides transiting to SBC, Level 3 proposes language in 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. Surely, Level 3 would not propose such language if fully recovering the cost of transiting service was not a problem.

Finally, Level 3 resorts to scare tactics, claiming that there will be a “[d]etrimental [i]mpact on U.S. [c]onsumers” and that customers will “suffer service disruptions” if the Commission does not require transiting as part of this interconnection agreement. Level 3 Br. at 125, 134. But, again, Level 3’s argument is based on the incorrect assumption that SBC will stop providing transiting. SBC’s tariff (with Commission-approved rates) and its separate transiting agreements ensure that SBC will continue to provide transiting service at reasonable prices. SBC Ex. 1.0 (Albright Direct) at 62-63; SBC Ex. 7.0 (McPhee Direct) at 23-24.

Level 3’s proposed transiting language should be rejected in any event. If the Commission were to reject Staff’s recommendation and require terms and conditions relating to transiting to be included in the interconnection agreement, it should adopt SBC’s Transit Traffic Service Appendix, and reject Level 3’s proposed transiting language (set forth in the ITR Appendix), for the reasons set forth in SBC’s initial brief at 150-52.

Level 3 posits only one criticism of SBC’s proposed transiting language: that the price of transiting increases after 8 million minutes of use in a month. Level 3 Br. at 132. To begin with, there is no evidence that Level 3 has ever come close to approaching the 8 million minute threshold or that it is foreseeable Level 3 will do so in the future. Moreover, the 8 million minute threshold serves two important purposes. *First*, it provides an incentive for Level 3 to establish direct connections with other carriers when traffic levels are high – and everyone (even Level 3) agrees it is appropriate for carriers to stop relying on transiting and establish direct connections when traffic reaches a high 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 8 million minutes of use per month is fully consistent with Level 3's own policy position that carriers should minimize the amount of transit traffic they directly route through the other's network to a third party – see Level 3's 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, Level 3's complaint that the increase in the price of transiting after 8 million minutes of use in a month is not based on actual costs ignores the fact that as a legal matter, SBC does not have to provide transiting at TELRIC rates for even the first 8 million minutes of use. 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 WCB did not reach), it "would not require that service to be priced at TELRIC." Thus, under SBC's proposal, Level 3 is receiving a significant price break (to which it is not legally entitled) for the first 8 million minutes of use.

* * *

The Commission should conclude that the 1996 Act does not require SBC to provide transit service, and therefore terms relating to such service should not be included in the interconnection agreement. Staff agrees. Staff Br. at 43-44. However, in the event the Commission concludes that transiting terms and conditions should be included in the interconnection agreement, it 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, and which does not suffer from the infirmities of Level 3's language discussed in SBC's initial brief at pp. 150-52.

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

Level 3's proposal to use local interconnection trunk groups to carry interexchange traffic that Level 3 exchanges with SBC in Level 3's capacity as an IXC should be rejected for several reasons. Staff agrees. Staff Br. at 41 (recommending that the Commission adopt SBC's proposal, "which would require Level 3 to do, what Mr. Hunt states it normally would do in any case, and pass interLATA toll traffic over feature group D trunk groups rather than over local interconnection trunk groups.").

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*, 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 (sometimes called Feature Group D access trunks) – not local interconnection trunks – and this Commission lacks jurisdiction to alter those federal access tariffs. *Third*, Level 3's proposal to combine local/IntraLATA toll traffic with interexchange access traffic on the same trunk group would create significant and intractable billing problems without any discernible upside.

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. Level 3 proposes contract language that would permit it to use

local interconnection trunk groups to carry interexchange traffic that Level 3 exchanges with SBC in Level 3's capacity as an IXC. That proposal is an illicit effort to have the Commission decide an issue beyond the jurisdiction conferred on it under sections 251 and 252 of the Act. 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 an IXC. Only a CLEC, not an interexchange carrier, can request an interconnection agreement and demand arbitration. Moreover, the sole purpose of this arbitration is to implement the requirements of sections 251 and 252 of the 1996 Act – none of which relates to the routing and transmission of interexchange service. *See* SBC Br. at 85-91.

Level 3 admits that “Congress has enacted a detailed system for governing carrier rates for jurisdictionally interstate communications in Sections 201 through 208 of the Act” (Level 3 Br. at 39) – which sections authorize the FCC to conduct hearings concerning the lawfulness of tariffs (section 204) and to prescribe changes to existing tariffs (section 205). Yet, at the same time, Level 3 maintains that terms and conditions relating to such interstate communications are also governed by section 251/252 interconnection agreements. That is not so.

The FCC has held that the local competition provisions of sections 251 and 252 of the Act do not govern terms and conditions of interexchange access service; rather, such terms and conditions are governed by sections 201 through 208, as Level 3 itself points out. *Local Competition Order*, ¶ 191 (“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)"); *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”).

This Commission and federal courts agree. *See, e.g.,* 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 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”).

Level 3 also argues that it must be permitted to commingle traffic on a single trunk group because SBC has an obligation under section 251(c) (and FCC Rules 100 and 305) to permit interconnection “at any technically feasible point.” Level 3 Br. at 11-12. Section 251(c) and those rules, however, have nothing to do with Level 3’s trunking obligations or the issue of what type of traffic can be carried over local interconnection trunk groups. Section 251(c) relates to SBC’s obligation to provide “interconnection” – which the FCC has concluded 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. The same is true of

Rules 100 and 305. Contrary to Level 3's suggestion, trunking to a point in the network does not create a POI, and 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 (over which Level 3's trunks ride) are physically connected to SBC's network. *Id.* 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 additional *trunks* to ride over those facilities. *Id.* at 2-6, 44.

As for the suggestion that federal law permits it to establish a single POI for the exchange of *all* traffic between the parties' networks (Level 3 Br. at 103), Level 3 again misreads the law. Section 251(c)(2) requires interconnection for the transmission and routing only of "telephone exchange service and exchange access." And the FCC has held that an IXC seeking interconnection for purposes of originating or terminating its *interexchange* traffic – as Level 3 seeks to do here – is not seeking interconnection for the transmission and routing of "telephone exchange service" or "exchange access." *Local Competition Order*, ¶ 191.²⁶

²⁶ Level 3 also argues that SBC is required to permit the commingling of traffic under the nondiscrimination provisions of sections 251(c)(2)(C) and 251(c)(2)(D). Again, section 251(c)(2) relates to SBC's obligation to interconnect (physically link) its network with Level 3's network. Thus, the nondiscriminatory provisions of subsections (C) and (D) relate to that obligation – not to the type of traffic that should be carried over local interconnection trunk groups. And while Level 3 suggests that SBC permits itself and its affiliate to commingle interexchange access traffic with local traffic on a single trunk group, it cites no record support for that claim. In fact, IXC interexchange traffic delivered to the SBC local network by SBC's long distance affiliate (or the IXC whose service that affiliate resells) is delivered over Feature Group D access trunks, as required by the applicable tariffs. Once that traffic is delivered to the network, it is commingled with local and intraLATA traffic. But that is true of all IXC traffic once it arrives on SBC's local network. As for traffic originated by an SBC end user customer and delivered to SBC's IXC affiliate by SBC, that traffic is indeed commingled with local traffic on common transport trunks that run between the originating end office and SBC's access tandem. And there it is routed to the IXC affiliate (or the IXC whose service that affiliate resells) *over Feature Group D access trunks*. But that is precisely what happens to IXC-bound traffic directed to IXCs that purchase originating switched access from SBC, including Level 3. Hence, there is no difference in treatment and therefore no conceivable discrimination.

Level 3 urges the Commission to follow state commission decisions that purportedly adopt proposals permitting CLECs to carry jurisdictionally distinct traffic on a single trunk group. But *this Commission* has already rejected attempts to commingle IXC-carried interexchange access traffic with local traffic on a single trunk group, holding that local/intraLATA toll traffic must be delivered on a trunk group that is separate from interexchange access traffic. Specifically, in Docket No. 96-0404, 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. The Commission 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.²⁷ As Staff correctly points out, "Level 3 has certainly failed to provide evidence for the Commission to alter [its prior] decision[s] here." Staff Br. at 41.

The Texas decision cited by Level 3 does not support its position, because the Texas Commission specifically *excluded* interstate interexchange traffic from the traffic that may be put

²⁷ 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.

on the local interconnection trunk groups – which is what Level 3 seeks to do here.²⁸ Nor does the *Virginia Arbitration Order* support Level 3’s position. In that case, the FCC’s Wireline Competition Bureau permitted only minimal volumes of busy line verification and emergency interrupt calls between Verizon and WorldCom to be carried on local interconnection trunk groups. *FCC Virginia Arbitration Order*, ¶ 182. The WCB’s decision did not deal at all with the traffic at issue here: IXC-carried interexchange traffic. And it certainly did not invalidate federal access tariffs requiring that IXC-carried interexchange access traffic be carried over access trunks, as Level 3’s proposal would.

Level 3’s rights and obligations as an interexchange carrier are governed by federal access tariffs, which this Commission is without power to alter. Terms and conditions relating to Level 3’s relationship with SBC when Level 3 is acting in its capacity as an IXC are governed by federal (and state) access tariffs. Level 3 makes several desperate attempts to avoid application of SBC’s federal access tariff, all of which must be rejected because, among other reasons, this is not the proper forum to challenge that tariff.

First, Level 3 suggests that SBC’s federal switched access tariff is ambiguous and that SBC is wrong when it asserts that the tariff requires Level 3 to carry interexchange traffic between SBC and Level 3 over Feature Group D access trunks. Level 3 Br. at 36-40. But Level 3’s own witness, Mr. Hunt, concedes that SBC is correct on this point:

Q [I]f you were acting as a traditional interexchange carrier you would have to deliver that on a Feature Group D trunks, is that what you said?

²⁸ Amended Final Order Modifying Arbitration Award and Approving Interconnection Agreement, *Petition of Sprint Communications Company L.P. d/b/a Sprint for arbitration with Verizon Southwest Inc. (f/k/a GTE Southwest Inc.) d/b/a Verizon Southwest and Verizon Advanced Data Inc. under the Telecommunications Act of 1996 for rates, terms and conditions and related arrangements for interconnection*, Texas PUC Docket No. 24306, May 14, 2004, at pp. 3-5.

A What I said is if we purchased switched access services from SBC, and I believe SBC requires you to purchase a Feature Group D trunk to terminate that traffic from phone to phone, one-plus dial traffic, then that is what we will do.

Q That is a requirement in the access – switched access tariff?

A Yes.

Cal. Tr. (Oct. 26) at 30-31.

As for Level 3's suggestion (at 36) that interstate information services are excluded from the requirements of the federal access tariff, it is plainly wrong. The federal access regime is not limited to interstate *telecommunications* traffic; rather, interstate information services are also covered.²⁹ *See, e.g.*, 47 U.S.C. § 251(g) (“each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations”). Level 3 points to nothing in SBC's federal access tariff that excludes interstate information services from its purview, and there is nothing.

Finally, in an apparent concession that the federal access tariff is not ambiguous and that its terms do in fact apply to interstate information services, Level 3 suggests that the Commission should render the federal access tariff invalid. Level 3 Br. at 38-40. But the Commission does not have the option to ignore federal law; nor does the Commission have authority to invalidate the federal access tariff. *Cahmann v. Sprint Corp.*, 133 F.3d 484, 486-87 (7th Cir. 1998) (holding that claims are preempted where resolution of the claim would effectively invalidate a federal

²⁹ That is precisely why the so-called “ESP exemption” was required to “exempt” certain information services from access charges. Absent the exemption, these interstate services would have been subject to access charges – conclusive evidence that the access charge regime in fact does apply to interstate *information* services.

tariff); *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 as 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 (2^d Cir.1998) (“[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) (filed tariff doctrine “prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority”).

Level 3 also claims (at 36) that the FCC and federal courts have held that “a carrier may not avoid the obligation to negotiate interconnection terms consistent with Section 251 of the Act (or avoid having such terms imposed by arbitration) simply by invoking an access tariff.”

Level 3 cites no authority for this statement, but presumably Level 3 is referring to decisions holding that state commissions may not create an alternative method (*i.e.*, tariffs) by which a competitor can obtain interconnection rights. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003). *See also Verizon North, Inc. v. Strand*, 367 F.3d 577, 584-85 (6th Cir. 2004) (rejecting an effort to create interconnection rights and obligations outside of the “elaborate statutory framework of s. 252”); *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm’n*, 359 F.3d 493, 496-98 (7th Cir. 2004) (state commission may not enter standalone order dictating

conditions on provision of local service outside “the process for interconnection agreements for local service under sections 251 and 252” of the 1996 Act). These decisions do not apply here because the tariffs at issue (state and federal access tariffs) do not relate to section 251/252 obligations that are subject to arbitration and negotiation; rather, they relate to a carrier’s rights and obligations when it is acting in its capacity as an IXC.

Level 3’s claims relating to increased costs and duplicative networks are without merit.

The overriding theme in Level 3’s discussion of the interconnection trunking issues is that SBC’s proposal to carry jurisdictionally distinct traffic on separate trunk groups would force Level 3 to “construct duplicative, inefficient interconnection trunk arrangements” and “build out multiple (at least 3) parallel, separate and distinct trunk groups.” Level 3 Br. at 23-24. Level 3 even goes so far as to claim that *its* proposal reflects the “the industry practice” and the parties’ current arrangement. Level 3 Br. at 23-24. The evidence proves just the opposite: SBC’s proposal (not Level 3’s) is consistent with industry practice and the parties’ current practice, and SBC’s proposal does not require the build-out of duplicative, inefficient trunk groups. Thus, even if Level 3’s policy arguments could override the law, which they cannot, they would fail.

Level 3 has already established separate local interconnection trunk groups to each SBC tandem, and Meet Point trunk groups to each SBC access tandem where it has customers – with local/IntraLATA toll traffic carried on the local interconnection trunk groups and InterLATA traffic from Level 3’s customers to an IXC (and vice versa) carried over the Meet Point trunk groups. Level 3 created these separate trunk groups 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. Level 3 has agreed to maintain those separate trunk groups. *See* Tr. at 232, 235 (Wilson).

The only “additional” trunk group Level 3 might be required to provision – assuming it has not already done so – is an access trunk group to carry interstate interexchange access traffic that Level 3, acting as an IXC, delivers to SBC’s network for termination to an SBC end user customer. But that is a federal access tariff requirement. And if Level 3 objects to that requirement, it must seek relief from the FCC – it cannot circumvent the FCC’s jurisdiction by seeking to invalidate the federal access tariff requirement via an interconnection agreement. *Cahmann*, 133 F.3d at 486-87 (holding that claims are preempted where resolution of the claim would effectively invalidate a federal tariff). *See also Metro East Center for Conditioning and Health*, 294 F.3d at 927; *Evanns*, 229 F.3d at 840; *Fax Telecommunications Inc.*, 138 F.3d at 489; *Hill*, 364 F.3d at 1317. In addition, Staff correctly observes that Level 3’s estimates for the additional capacity it would need to handle the access traffic “does not appear accurate” (Staff Br. at 38) and that the evidence suggests that “the costs of establishing separate trunk groups . . . is [not] particularly significant” (*id.* at 40).

Level 3 claims it “is always preferable to combine as much traffic as possible onto a single trunk group” and that it is inefficient to split one large trunk group into multiple smaller trunk groups. Level 3 Br. at 29, 50. The latter claim is beside the point – SBC’s proposal does not require Level 3 to split large trunk groups into smaller trunk groups because Level 3 already has established separate local interconnection and Meet Point trunk groups. As for Level 3’s claim that it is always better to put as much traffic as possible on a single trunk group, that is only true in a theoretical sense in a hypothetical circumstance that bears no resemblance to the real world. SBC Ex. 1.0 (Albright Direct) at 40. If there were only one Level 3 switch connected to one SBC switch, then a single trunk group might be more efficient. *Id.* However, the Level 3 switch must interconnect to many SBC switches, and other carriers must also

interconnect with the SBC switches. *Id.* at 40. But there is a finite number of trunk ports in any switching system – a tandem is limited to 100,000 trunks. *Id.* at 41. Given the limitations of SBC’s tandem switches, it is more efficient to distribute trunk groups from all carriers across SBC’s many switches. *Id.* at 41-42. Otherwise, any one CLEC could exhaust a tandem with one interconnection and prevent other carriers from interconnecting at the tandem. *Id.* Level 3’s logic would have this Commission ignore the needs of other CLECs and the ramifications of tandem exhaust.³⁰

Level 3’s proposal to commingle IXC-carried interexchange access traffic with local/intralata toll traffic would create significant billing problems. Level 3’s proposal to combine local/IntraLATA toll traffic with interexchange “access” traffic on a single trunk group – the local interconnection trunk group – would create significant billing problems for SBC. Staff correctly observes that SBC witness McPhee’s “statement that SBC Illinois has not billed Level 3 for any switched access local switching charges since January, 2003, indicates that Level 3 is sending interLATA toll traffic over local interconnection trunks and is not being billed appropriate switched access charges for this interLATA toll traffic.” Staff Br. at 39. In fact, Level 3 admits that SBC’s switches and facilities cannot capture the information necessary to identify and properly bill IXC-carried interexchange access traffic (*see, e.g.* Level 3’s proposed language for section 3.2.2.4 of the IC Appendix). As a result, Staff correctly observes, Level 3 is “failing to pay significant switched access charges that are due SBC.” Staff Br. at 39.

³⁰ If a tandem exhausts, SBC incurs substantial expense to provision another tandem. Moreover, as additional tandems are added, each additional tandem has fewer new trunk ports available due to the interconnections required to all pre-existing switches. SBC Ex. 1.0 (Albright Direct) at 41-42.

Level 3 nevertheless argues that proper billing is a non-issue because the parties can establish percent local use (“PLU”), percent interstate use (“PIU”), and percent of IP use (“PIPU”) factors and apply them to *estimate* how much commingled, jurisdictionally distinct traffic belongs in each “bucket.” Level 3’s proposed contract language, however, does not even mention PLU and PIU factors, much less explain how they would be calculated. And while Level 3’s proposed language for section 3.2.2.4 of the IC Appendix mentions the PIPU factor, it does not propose any method to calculate the factor; rather, it provides that the parties will “agree to develop a Percentage of IP Use (“PIPU”) factor.” In fact, even Level 3’s witness concedes that Level 3 has not developed any method for calculating the PIPU factor. Level 3 Ex. 2.0 (Wilson Direct) at 59 (“Level 3 has not yet developed a specific method of calculating PIPU to identify IP enabled services traffic”). Level 3 also concedes 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. at 272, 274 (Wilson).

Level 3 offers a vague explanation of the process for developing factors, but all that 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 or 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 OLI code would have to be attached to the call record to identify calls that originate as IP-enabled traffic. Level 3 Br. at 42. But, again, Level 3’s proposed contract language does not set forth even this vague process for developing factors. And, equally importantly, Level 3 has

no idea how the PIPU factor would be calculated; nor does the industry as a whole (because there currently is no industry standard governing what the OLI code should be). Tr. at 272, 274 (Wilson).

At bottom, Level 3 asks the Commission to approve its proposal to carry jurisdictionally distinct traffic on the same trunk groups even though it admits that (1) SBC's switches and facilities cannot capture the information necessary to identify the traffic exchanged, (2) carrying traffic on a single trunk group would require the use of factors, (3) Level 3 has proposed no contract language describing the process for calculating these factors; (4) Level 3 has not developed a method for calculating the PIPU factors; and (5) the industry itself has not developed a method for calculating the PIPU factors. Level 3's "let the parties sort it out later approach" must be rejected. If Level 3's "trust me, we'll work something out" approach were adopted, SBC would be left with intractable billing problems and no enforceable contract rights that would ensure a process that would work to ameliorate those problems.

Even if Level 3 had presented a cogent, easily understood process that reflected recognized, widely-accepted industry standards, there still remain two critical problems with its proposal to apply PLU, PIU, and PIPU factors. *First*, the process Level 3 attempts to describe is inherently cumbersome and expensive. *Second*, the process would inevitably lead to significantly *undercompensated* 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. This would produce accurate billing only if there happened to be a perfect match between what happened in the past and what happens in the current period.

It is clear there will be a mismatch. Level 3 makes no bones about its hope *and expectation* that the volume of interstate interexchange traffic it delivers to SBC will increase

dramatically and continuously in the coming months and years. If that happens, any factors that might be developed would always understate the amount of such traffic in the current period, resulting in billing errors that would always favor Level 3 and always hurt SBC.

Level 3 responds that the parties could always recalculate the PLU, PIU, and PIPU after the fact and then “true up” based on the recalculation, but Level 3 has not proposed any contract language that would accomplish this. The audit provisions of section 11.1 of the GT&C Appendix do not address the unique situation here. Section 11.1 permits an audit (at the auditing party’s expense and *only once a year*) of the audited party’s “books, records, data and other documents . . . for the purpose of evaluating [] the accuracy of Audited Party’s billing and invoicing of the services provided” under the ICA – in other words, section 11.1 permits party 1 to audit party 2’s bills. But, here, *SBC* is the billing party. And SBC would want to audit PLU, PIU, and PIPU factors (not only to determine their accuracy, but also their applicability to the time period for which they were used to estimate the size of the various jurisdictional “buckets”), not Level 3 billing records. None of the language proposed by Level 3 (in section 11.1 or anywhere else) allows SBC to perform such an audit, nor does any of Level 3’s proposed language allow for a true-up of the inevitable underbilling.³¹ There is nothing in the contract that addresses the complicated scheme of perpetual calculations, audits, and true ups proposed by Level 3.

³¹ Level 3 may suggest that section 8.11 of the GT&C might be read to give SBC the right to periodic true ups to correct for the inevitable mismatch between the factor-derived estimates and the actual traffic composition. Any such suggestion would be incorrect. The section in question concerns correcting for past billing errors (*e.g.*, Level 3 ordered and received two widgets and SBC’s bill mistakenly only requested payment for one). It does not concern after-the-fact adjustments to bills that were correct and complete when rendered. Moreover, it does not even create or confer back billing rights; rather, the section’s sole purpose is to specify limitations on such rights. That is clear from its title: “Limitation on Back-billing and Credit Claims.”

Finally, even if Level 3 had proposed language providing for an audit and true-up, its proposal would create both an administrative headache and a fertile ground for ongoing debate and controversy. The parties presumably would set the factors now based on the current flow of traffic – this would require the parties to examine millions of billing records over a discrete period of time and the calls would have to be categorized according to the type involved. Once the factors were calculated, they would have to be perpetually audited and recalculated (as is clear from Level 3’s testimony that it expects a steady and significant increase in the amount of interstate interexchange traffic in the coming months and years). There would certainly be disagreements over how often the factors should be recalculated, as well as disagreements over the accuracy of the recalculations themselves. Moreover, the results of each recalculation would immediately become outdated and would not reflect the *current* flow of traffic (in particular, it would not reflect the increase in interstate interexchange traffic). Of course, this ongoing process of audits, recalculations, and true-ups would be unnecessary if Level 3 simply carried interstate interexchange traffic on trunk groups separate from local traffic.

The only surefire way to know precisely, in real time, how much of the traffic the parties exchange is local and how much is interstate interexchange access is to have the traffic exchanged over separate trunks (local traffic on local trunks and interexchange, access traffic on Feature Group D access trunks). SBC Ex. 1.0 (Albright Direct) at 36-37. Separate trunking for local/intraLATA toll and interexchange access traffic allows accurate tracking and billing of traffic exchanged between the carriers. *Id.* at 36. Separate trunking also eliminates virtually all administrative expense and burden, because there would be no need to calculate, recalculate, review, and audit factors.

Finally, separate trunking helps eliminate CLEC incentives to game the system by changing or deleting CPN to present an access call as a local call and avoid access charges. *Id.* at 36-38. While Level 3 may be beyond reproach, experience has taught that at least some carriers are not so scrupulous (*id.* at 37-38). Indeed, Staff duly noted that “the recent controversies cited by Mr. Albright suggest that carriers only recently have begun to discover discrepancies in traffic billing and measurement that have been overlooked in the part.” Staff Br. at 40.

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?

Level 3’s brief says nothing on this issue that SBC did not address in its discussion of ITR Issue 11(A) in its initial brief and herein. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion.

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

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?

Level 3’s brief says nothing on this either part of ITR Issue 12 that SBC did not address in its discussion of ITR Issues 1 and 11(A) in its initial brief and herein. Accordingly, the Commission should resolve this issue in favor of SBC for the reasons set forth in that discussion.

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?

The Commission should reject Level 3's proposal. PSTN-IP-PSTN and IP-PSTN traffic (which physically originates in one exchange and physically terminates in a different exchange) should be assessed interstate or intrastate switched access charges. As SBC explained in its initial brief and above in its discussion of IC Issue 2, SBC's position is consistent with the FCC's current regulatory regime, and should be adopted here. Moreover, the same issues with respect to the rating and routing of PSTN-IP-PSTN and IP-PSTN traffic are currently pending in proceedings before the FCC, including the FCC's *IP-Enabled Services NPRM*, as well as Level 3's own Petition for Forbearance. Until the FCC renders decisions in those proceedings, the Commission should preserve the regulatory *status quo* by adopting SBC's position.

Level 3 also asserts that the Commission should maintain the regulatory *status quo*, but argues that the FCC's current regulatory regime supports its position that IP-Enabled Services, including PSTN-IP-PSTN and IP-PSTN, are subject to reciprocal compensation under Section 251(b)(5) of the Act. But as demonstrated in SBC's initial brief and above in connection IC Issue 2, Level 3 is wrong. The FCC's current rules are clear that access charges apply to both PSTN-IP-PSTN and IP-PSTN traffic. Moreover, Level 3's contention that the Enhanced Service Provider ("ESP") exemption applies to IP-PSTN traffic and all other VoIP services (and thus, such traffic should be subject to reciprocal compensation) is also contrary to law. And because

the ESP exemption does not apply, SBC's proposal to continue to charge "jurisdictionalized" compensation rates for such traffic in accordance with its existing switched access tariffs pending the FCC's decisions in the various IP-Enabled Services proceedings is reasonable.³² SBC's proposal to assess interstate and intrastate access charges on interexchange IP-PSTN traffic is in fact necessary pending the outcomes of the FCC proceedings to ensure that SBC does not fall prey to the unlawful access charge avoidance schemes recognized by the FCC in the *Access Avoidance Order*.

Level 3's position on ITR Issue 18(B) should likewise be rejected. SBC Illinois' proposed language at section 12.1 reflects that all switched access traffic, including interexchange PSTN-IP-PSTN and IP-PSTN traffic, is properly routed over Feature Group (B or D) 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 Illinois to bill access charges to Level 3.

Level 3 asserts that SBC's position is contrary to section 251(c)(2) of the 1996 Act, which provides Level 3 with the right to choose how it will interconnect with SBC's network. Level 3 Br. at 53-54. But SBC's proposal does not require Level 3 to interconnect with SBC in a different manner than Level 3 has chosen. All SBC is asking is 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, SBC will permit Level 3 to

³² Further, 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, and the FCC's decision in that proceeding is due by March 23, 2005 at the latest. Of course, changing the current compensation scheme for IP-enabled traffic consistent with Level 3's proposal 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.

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?

Level 3’s core contention is that the Commission’s rejection of its proposed “Applicable Law” language “could serve as a waiver of Level 3’s rights to collocate in a new manner if allowed under the Act, FCC orders (etc.)” (Level 3 Br. at 22). That is plainly wrong. It is true, as Level 3 observes (*id.*) that “[e]ach of these sources of additional law [is] subject to revisions outside the scope of the interconnection agreement process, and Level 3 should not be precluded from taking advantage of these rights if it so chooses.” *But that is why the Agreement includes a change of law provision pursuant to which Level 3 (and SBC) may avail themselves of such rights if they so choose.* The inclusion of the change of law provision in the Agreement forecloses any possible argument that Level 3 needs its proposed “Applicable Law” language to ensure it will be able to avail itself of new legal developments. Furthermore, the incorporation of that language in the handful of contract provisions for which Level 3 has proposed it would create an anomalous situation in which almost all changes of law would be given effect only pursuant to the mandatory procedures set forth in the change of law provision, while a special few, for no discernible reason, would instead be given effect as “Applicable Law.” *See supra* discussion of GT&C Issue 6.

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?

SBC anticipated and addressed in its initial brief most of the arguments Level 3 makes in support of its position on the OET issues. In fact, Level 3 concedes SBC is not required to provide UNEs and collocation outside its incumbent territory (Level 3 Br. at 202), which is what

SBC's proposed OET language says. While Level 3 suggests an OET Appendix is not necessary, it does not point to any other contract language that delineates this basic proposition (about which the parties do not disagree.) Level 3, in fact, concedes there is no other language, agreed or proposed, that does this; instead, it argues that language could be added to the General Terms and Conditions to accomplish it. *Id.* Yet, Level 3 did not (and still does not) propose such language. The only language on the table is SBC's. Given that the parties agree about the scope of SBC's obligations, and agree that the agreement does not elsewhere define that scope, the sensible course is for the Commission to adopt SBC's language.

Level 3 makes a broad claim that SBC's proposed language is "confusing, unnecessary and duplicative." Level 3 Br. at 201. It is none of these. First, it is astonishing that Level 3 would claim the language is confusing, since it is identical to language Level 3 agreed to for the ITR and GTC appendices. Level 3 acknowledges this in its brief. *Id.* Nowhere does Level 3 explain how language that is acceptable to it in one appendix becomes confusing in another. Nor is SBC's proposed language unnecessary or duplicative. As SBC explained in its initial brief, the ITR and NIM appendices addresses traffic related to SBC's obligations under section 251(c)(2), while the OET Appendix addresses traffic that originates or terminates with a Level 3 end-user outside the SBC incumbent local exchange area. *See* SBC Br. at 191; *see also* SBC Ex. 2.0 (Chapman Direct) at 3-4; SBC Ex. 7.0 (McPhee Direct) at 47-49. Thus, while the language SBC proposes for the OET appendix is identical to language in the ITR appendix, it serves a different, but necessary, purpose.

Level 3 also claims that SBC's definition of OET Traffic is "too vague and confusing." Level 3 Br. at 200. Specifically, Level 3 takes issue with the portion of the definition that states OET Traffic is "exchanged pursuant to an FCC approved or court ordered InterLATA boundary

waiver, or intraLATA traffic to or from a non-SBC ILEC exchange area.” *Id.* This is a peculiar assertion for Level 3 to make, because Level 3 has agreed to that portion of the definition of OET Traffic. In any event, the language is not vague or confusing; certainly, Level 3 does not explain how it purportedly is.

As a final overarching irrelevancy, Level 3 expends considerable effort asserting that its network witness, Mr. Wilson, has not heard of the term “Out of Exchange,” and that, *from a network perspective*, whether a call is out-of-exchange does not matter. Level 3 Br. at 200-201. This only demonstrates that Level 3 does not fully understand this issue. The reason for the OET Appendix is *not* a technical one; it is a *legal* one. And it is no surprise that a witness with 25 years of network experience might not be familiar with the concept of Out of Exchange Traffic, as the concept arose relatively recently, out of the 1996 Act, and relates to the *legal* obligations imposed on ILECs.

* * *

Turning to the language at issue in OET Issue 1, Level 3 seems to have confused the language in OET Section 2.1 with the language at issue in GT&C Definitions Issue 16. OET Issue 1, as discussed in SBC’s initial brief, simply reflects a proposition about which the parties do not disagree: the obligations that section 251(c) imposes on SBC are limited to those areas in which SBC is the incumbent. The point of the OET Appendix is to address the obligations of SBC as they relate to traffic that originates from or terminates to a Level 3 customer outside that incumbent area. Level 3’s discussion of this issue is misplaced (and its reasoning faulty, as

discussed in connection with GT&C Definitions Issue 16)³⁴. SBC's proposed language for OET section 2.1 should be adopted.

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?

Level 3's brief does not address the specific language that SBC proposes for OET section 2.3. Although Level 3 makes the general assertion that SBC's language "limits" SBC's obligations, it does not say how. As discussed above, the parties agree that SBC's obligations under section 251(c) are limited to SBC's incumbent territory. SBC's proposed OET section 2.3 merely makes that clear.

Instead of addressing SBC's language, Level 3 devotes most of its brief to defending its proposed language referencing "Applicable Law." Level 3 Br. at 203-05. Level 3's proposed references to "Applicable Law" should be rejected here for the reasons discussed in connection with issues GT&C-6 and NIM-7.

Moreover, the "Applicable Law" to which Level 3 seems to be referring in this instance is alleged obligations imposed on SBC by section 271 of the 1996 Act. As we demonstrate in connection with UNE Issue 1, section 271 imposes no obligations on SBC that are enforceable or arbitrable under section 252.

³⁴ Level 3 expresses a concern (Level 3 Br. at 203) that if SBC sells an exchange, Level 3 might not have an interconnection agreement with the purchaser of that exchange. *Id.* This concern is unwarranted and beside the point. If SBC plans to sell an exchange, it will in all likelihood have to advise this Commission. Level 3 will have ample time to enter into an interconnection agreement with the new owner of the exchange, to the extent it does not already have one. Moreover, it is not SBC's obligation to provide services to Level 3 outside its incumbent area; if Level 3 wants to provide service, it ought to accept the responsibility to enter into an interconnection agreement with the appropriate party.

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?

Level 3 argues out of both sides of its mouth on this issue. In its brief, it suggests that SBC's proposed language "unnecessarily limits[s] the parties' options." Level 3 Br. at 205. But Level 3 concedes it has already agreed to this language (and the very limitations it supposed "unnecessarily" includes) in Section 5.4.8 of the ITR Appendix. *Id.* at 201. Level 3 fails to explain why this language is appropriate for the ITR Appendix but not for the OET Appendix.

In fact, SBC's proposed language is appropriate in both places. As we explained in our initial brief, SBC's language is consistent with existing industry standards. SBC Br. at 194. Level 3 suggests that, at least for purposes of the OET Appendix, it needs flexibility to use certain unspecified, future technologies that may be recommended by the industry's Ordering and Billing Forum. Level 3 Br. at 205. But Level 3 has not proposed any language that would provide for such flexibility, and SBC's proposed language does not deny Level 3 the flexibility it seeks in any event. Rather it merely requires that certain necessary parameters be sent using MF or SS7 signaling. SBC Ex. 8.0 (Novack Direct) at 12. Because originating carriers have failed in the past to send some of these parameters, the proposed language is necessary to ensure that the parties can properly bill and route calls. *Id.* at 13. There is nothing in SBC's language that limits the parties' consideration or use of other technologies. *Id.* at 14. Finally, Level 3 offers no explanation why it needs such flexibility for OET Traffic, but not other traffic. In fact, Level 3 goes to great lengths to explain that, from a network perspective, OET Traffic is handled in the same way as other traffic. Level 3 Br. at 200-01.

For these reasons, and the reasons set forth in SBC's initial brief, SBC's language for OET section 3.1 should 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?

Level 3 has agreed to the language in each of OET sections 3.3, 3.4, 3.5 and 3.6 in other appendices, as Level 3 acknowledges. Level 3 Br. at 201. Mysteriously, though, when SBC proposes to include the same language in the OET Appendix, the language suddenly becomes problematic for Level 3. Level 3's objections are illogical and unsupported.

Level 3 suggests these provisions are not necessary because the parties have agreed to certain performance measures. Level 3 Br. at 206. But Level 3 does not identify which performance measures it believes cover these matters. Nor does Level 3 explain why SBC's language is acceptable for use in the GT&C and ITR Appendices, but not in the OET Appendix. Presumably, Level 3 would agree that whatever performance measures it is talking about apply to those appendices just as they would apply to the OET Appendix. As for Level 3's false accusation that SBC is trying to force Level 3 to waive its rights under the Performance Measurements Appendix, FCC regulations and Commission Orders (*id.*), Level 3 fails to explain how, and to identify what appendix sections, regulations or orders it means.

Level 3's unsupported assertions continue. Level 3 alleges SBC will have the ability to negatively impact Level 3's service if its language about network rerouting and protective controls is adopted (OET Issue 4(B)). *Id.* Level 3 does not cite to any record evidence to

support this claim; nor does it explain how SBC's language would endow SBC with such an ability. Of course, Level 3 glosses over the fact that it already agreed to this language elsewhere.

Level 3 concedes, as it must, that there is a need to maintain the technical integrity of the parties' networks, but then suggests that the language SBC proposes is vague. Level 3 Br. at 206-07. But this same language was not vague when Level 3 agreed to it in GT&C section 36.2.

Level 3 also complains that SBC's proposed OET section 3.6 is "far too broad and vague," while at the same time admitting there is "the obvious need for the two parties to cooperate in the interconnection process." *Id.* at 207. True to form, Level 3 does not identify what language it thinks is vague. Nor could it, since it is not; it is the same language Level 3 agreed to for ITR section 10.3.1. *Id.* at 201.

- 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?**

The parties agree these issues can be resolved by reference to other issues raised in this arbitration. For an identification of the issues to which each of the above disputes relates, *see* SBC's initial brief at pages 197-98.

With respect to OET Issue 5(C), Level 3 again argues that “OET Traffic” is a new term and therefore should not be used in the parties’ agreement. Level 3 Br. at 209. SBC addressed this argument in connection with its discussion of OET Issue 1 above, and respectfully refers the Commission to that discussion.

OET ISSUE 6: SHOULD LEVEL 3 BE REQUIRED TO TRUNK TO EACH TANDEM IN THE LATA?

As SBC indicated in its opening brief, this issue can be resolved in the same manner as ITR Issue 4(A). The parties have now resolved ITR Issue 4(A). Specifically, the parties have agreed to language to include in section 4.2 of the ITR Appendix. The Commission should therefore direct the parties to modify the language proposed by SBC for OET section 4.2, if necessary, to make it consistent with ITR section 4.2.

Level 3 suggests its proposed language will “provide the Parties with clarity on the duties and roles of the Parties” Level 3 Br. at 211. Level 3’s claim of “clarity” is absurd. Its proposed language is the poster child for unclear: “The parties agree to reference the relevant terms and conditions from Appendix ITR following arbitration and before submitting a final agreement to the relevant state commission for approval.” OET, § 4.2. What relevant terms and conditions does Level 3 propose to reference? How will it reference them? What happens if, after this arbitration is completed, the parties cannot agree on what the relevant terms and conditions are? Level 3’s proposed language is hopelessly inadequate.

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?

Level 3’s initial brief merely references its discussion of OET Issue 6. Level 3 Br. at 212. SBC therefore incorporates by reference those portions of its initial and reply briefs that

discuss that issue. Indeed, the language Level 3 proposes to resolve OET Issue 7 is identical to the language it proposes for OET Issue 6, and so suffers from the same fatal defects.

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?

Level 3’s discussion of OET Issue 8(A) in its initial brief merely references its discussion of OET Issue 6. Level 3 Br. at 212. SBC therefore incorporates by reference its foregoing reply on OET Issue 6.

With respect to Issue 8(B), Level 3 simply incorporates its discussion of section 251(c)(2)(B) of the Act, and the parties’ respective obligations thereunder, contained in the portion of Level 3’s brief addressing ITR issues. *Id.* Therefore, SBC refers the Commission to its discussion of the ITR issues.

Finally, SBC notes that, as with the language proposed by Level 3 for OET Issues 6 and 7, Level 3’s language is unclear. In fact, the language that Level 3 proposes to resolve OET Issues 8(A) and 8(B) is identical to the language it proposes for OET Issues 6 and 7.

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”?**

The parties agree this issue is the same as OET Issue 5(B). *See* SBC’s discussion of that issue, as well as its discussion of IC Issues 1, 3, 5 and 10(A) and GT&C Definitions Issues 8 and 18.

**OET ISSUE 10: SHOULD THE OET APPENDIX INCLUDE TERMS
DETAILING THE COMPENSATION DUE EACH OTHER
FOR EXCHANGING TRANSIT TRAFFIC?**

See 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?**

With respect to subpart (A) of OET Issue 11, SBC refers to its discussion of OET Issue 9, as well as its discussion of IC Issues 1, 3, 5, and 10(A) and GT&C Definitions Issues 8 and 18.

With respect to OET Issue 11(B), Level 3’s argument is bizarre. It opposes SBC’s language – which provides that “[t]he Parties agree that the associated traffic from each SBC-13STATE End Office will not alternate route” – on the ground that SBC “presupposes” that such traffic will need to alternate route and that Level 3 does not agree with that presupposition. Level 3 Br. at 214. If Level 3 does not believe such traffic needs to alternate route, one wonders what possible problem it could have with language that says the traffic will not alternate route. Moreover, Level 3’s argument, even if it made sense, misses the point. The issue is not whether the traffic needs to alternate route; the issue is whether legally it can alternate route. As SBC witness Albright explained, the methods by which an ILEC can deliver certain local traffic are limited by law, and any method agreed upon by Level 3 and SBC to exchange such local traffic must be in compliance with those limitations. SBC Ex. 1.0 (Albright Direct) at 76. As SBC demonstrated, two-way direct final trunks best comply with these restrictions. *Id.* Level 3 fails to respond to this argument.

OET ISSUE 12: SHOULD THE AGREEMENT REQUIRE THE PARTIES TO USE A TWO-WAY DIRECT FINAL TRUNK GROUPS TO EXCHANGE TRAFFIC WITH LEVEL 3?³⁵

See discussion of OET Issue 11(B) above.

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?

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?

The basic premise underlying Level 3's position on this issue is Level 3's contention that it needs access to tariffs in order to avail itself of new and existing collocation arrangements. It does not, as SBC explained in its initial brief, at 204-05. Over and over, Level 3 claims it needs to be able to purchase collocation out of tariffs because that is the manner in which SBC makes new collocation arrangements available. That simply is not so. As SBC witness Fuentes explained, and as Level 3 chooses to ignore, SBC will make available all collocation offerings – new and existing – through interconnection agreements or Accessible Letters, or both. SBC Ex. 5.0 (Fuentes Direct) at 5-6. And in the unlikely event that there is a change in law of which Level 3 seeks to take advantage and SBC does not publish an Accessible Letter, the ICA provides a mechanism that will permit Level 3 to take advantage of that change in law. *See* GTC Appendix, § 21. Thus, Level 3 has no need to order from a tariff.

³⁵ OET Issue 12 was inadvertently mislabeled OET ISSUE 11 in the DPL jointly filed by the parties.

Level 3 asserts that SBC's language would "create an administrative burden on the Parties" (Level 3 Br. at 190), but does not explain what burden it thinks would be created. None would.

Level 3 next takes issue with SBC's citation to the FCC's new "all or nothing" rule. SBC addressed Level 3's arguments on this point in its initial brief, at 203-04, and refers the Commission to that discussion.

Finally, sprinkled throughout Level 3's discussion are numerous references to an alleged need to reference "Applicable Law" in the Agreement. *See* Level 3 Br. at 189, 190, 191, 192. However, Level 3 has not actually proposed any language to incorporate "Applicable Law" into either the Physical or Virtual Collocation Appendix. Indeed, Level 3 has not proposed *any* language to counter SBC's proposal for section 1.2 of the Virtual Collocation Appendix or section 4.4 of the Physical Collocation Appendix.³⁶ Nor would any "Applicable Law" language have been necessary if Level 3 had proposed it. SBC will make all collocation arrangements available to Level 3 through an interconnection agreement or an Accessible Letter. And if SBC did not, Level 3 has recourse in the agreed change of law provision, which is also all Level 3 needs to protect itself from waiving its rights to future legislative, administrative or court proceedings. Level 3 Br. at 191.

Staff supports SBC's position, with minor modification. Staff Br. at 9-10. As SBC indicated in its initial brief, it does not object to Staff's proposed modification. SBC Br. at 205-06.

³⁶ Level 3 claims it has proposed language for these sections. Level 3 Br. at 191-92. It has not, as reflected by the DPLs and Appendices jointly filed by the parties on August 18, 2004.

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?

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?

Most of Level 3’s discussion of PC Issue 2 and VC Issue 2 centers on Level 3’s claim that SBC is trying to be the “arbiter” of what equipment may be collocated. Level 3 Br. at 192; *see also id.* (suggesting that SBC wants “preemptive unilateral authority” to prevent Level 3 from collocating equipment); *id.* at 193 (complaining that Level 3 will be subject to SBC’s “whim”). Level 3 misrepresents SBC’s position. Nowhere does SBC claim that it has – or should have – final authority to determine whether equipment is necessary for collocation or meets applicable safety standards. Nor does SBC’s proposed language reflect such a view.

The issue presented by PC Issue 2 and VC Issue 2 is whether, in those cases where the parties have a genuine dispute about whether equipment can be collocated, Level 3 may go ahead and collocate such equipment while the parties resolve the dispute.

Level 3 is correct that SBC witness Fuentes accurately summarized this issue in her testimony. Level 3 Br. at 192. But Level 3 ignores the operative language in Ms. Fuentes’ testimony, which makes clear that the question of what can be collocated is ultimately determined “through party-to-party discussions or Commission intervention.” *Id.* This dispute pertains to what happens while those discussions and/or Commission intervention are pending.

Level 3’s reliance on 47 U.S.C. § 51.323(c) is misplaced. Level 3 Br. at 193. That provision has nothing to do with whether equipment can be collocated while the parties pursue

dispute resolution to determine if the equipment is necessary for interconnection or access to UNEs or meets applicable safety standards.

Level 3 also suggests that SBC's language creates "ambiguity with respect to the proper level of safety standards." *Id.* Level 3's suggestion is baseless. The provision at issue has nothing to do with the substantive safety standards that govern collocation equipment. Those standards are dealt with in agreed language section 6.11 of the Physical Collocation Appendix and section 1.10.8 of the Virtual Collocation Appendix.

Level 3 next claims that the FCC has addressed this issue and resolved it in favor of Level 3. Level 3 Br. at 193-94. That is false. The issue addressed in the FCC's *Collocation Remand Order* had to do with the substantive interpretation of the term "necessary"; it did not have anything to do with whether equipment may be collocated while the parties are resolving a dispute about application of that decision (or any other decision relating to the meaning of "necessary" or the appropriate safety standard).

Finally, Level 3 asserts that SBC's language "would unnecessarily delay Level 3's ability to compete and provide services to its customers." Level 3 Br. at 194. Yet, Level 3 does not offer even one example of SBC allegedly engaging in the behavior Level 3 claims it fears, even though its witness has been involved with collocation with SBC for the past four years. Level 3 Ex. 5.0 (Bilderback Direct) at 3. Moreover, as SBC witness Fuentes explained, SBC has no incentive to engage in such behavior. SBC Ex. 5.0 (Fuentes Direct) at 8-9. The Commission should disregard Level 3's baseless accusations.

Staff supports SBC's position with a slight modification (Staff Br. at 10-11), which is acceptable to SBC. SBC Br. at 208-09. In fact, SBC has proposed specific contract language to accommodate Staff's suggestion. *Id.* at 209.

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?

Of Level 3's arguments on this issue, most are unsupported, several are based on a fundamental misreading of SBC's proposal, and none is persuasive.

Level 3 first claims that SBC's dispute resolution proposal will "complicate the business relationship between the Parties" and "cause ambiguity as to what provisions apply." Level 3 Br. at 195. Level 3 does not favor the Commission with any explanation as to how SBC's proposal will complicate the parties' relationship, or what is ambiguous about it. Nor could it. SBC's proposal is straightforward and easy to understand. And it is perfectly clear from the language of section 29.1.1 that SBC's proposed language applies to disputes relating to physical collocation: "In the event of a bona fide dispute between LEVEL 3 and SBC-13STATE regarding any bill for anything ordered from this Appendix" There is no ambiguity.

Level 3 does not really take issue with SBC's argument that there should be a collocation-specific dispute resolution provision. Level 3 Br. at 196. Rather, Level 3 takes issue only with a few of the specific provisions proposed by SBC. Where Level 3 does take issue, its arguments are hollow. First, Level 3 objects to SBC's proposal for mandatory arbitration, but the asserted basis for its objection make no sense. Level 3 claims the parties have already agreed in the GT&C dispute resolution provisions that all disputes can be brought to the Commission. *Id.* That is, of course, false; if it were so, we would not have PC Issue 3 to arbitrate. While SBC has agreed to bring certain disputes to the Commission pursuant to the GT&C dispute resolution provisions, it does not agree that those provisions should apply to collocation. For certain minor collocation disputes, SBC proposes mandatory arbitration and the parties are litigating that proposal.

Level 3 also asserts that SBC has not defined which disputes are subject to mandatory arbitration and which are not. *Id.* This is demonstrably false. SBC's proposed section 29.7.2 clearly states the threshold:

29.7.2 Billing Disputes Subject to Mandatory Arbitration – If not settled through informal dispute resolution, each unresolved billing dispute involving one percent (1%) or less of the amounts charged to LEVEL 3 under this Appendix during the twelve (12) months immediately preceding receipt of the notice initiating Dispute Resolution required by Section 29.5 of this Appendix will be subject to mandatory arbitration in accordance with Section 29.8 of this Appendix, below.

Most notable is what Level 3 does not dispute. Level 3 never disputes that mandatory arbitration will save the parties and Commission time and resources. For that reason, the Commission should adopt SBC's proposed mandatory arbitration provision.

Level 3 objects to the provision related to late payment charges. *Id.* at 197. Apparently, Level 3 thinks late payment charges will continue to accrue even after Level 3 deposits the disputed amounts in escrow. SBC's proposal does not so provide. Level 3 is responsible for late charges only if it does not pay its bill, or escrow the disputed amounts, in time. Moreover, contrary to Level 3's suggestion, SBC's proposed section 29.1.1.1 provides that SBC will fully credit back to Level 3 at the end of the dispute resolution process any late payment charges paid on successfully disputed amounts.

Third, Level 3 objects that it must dispute a bill within 30 days of receipt. Level 3 Br. at 197. Level 3 again misreads the SBC proposal. SBC's language states that a dispute must be brought to SBC's attention "not later than twenty-nine (29) days following the Bill Due Date." In other words, in addition to the time a CLEC has to pay the bill (*i.e.*, the time between issuance of the bill and the Bill Due Date), the CLEC has an *additional* twenty-nine days beyond the bill due date in which to respond. SBC Physical Collocation Appendix, § 29.2.1. Level 3's attempt

to compare Level 3 to a residential customer falls flat. *Id.* at 197-98. While a CLEC's collocation bills may be more complex than a residential end-user's bills, CLECs are sophisticated businesses. They should be able to review a bill and determine if there is a dispute within a month after the bill is due. SBC Ex. 5.0 (Fuentes Direct) at 11. Moreover, as SBC explained in its initial brief, collocation bills do not change significantly on a month-to-month basis. SBC's proposal gives Level 3 ample time to figure out if it thinks a bill is wrong.

For the above reasons and those set forth in SBC's initial brief, the Commission should adopt SBC's collocation dispute resolution proposal.

RECORDING ISSUE 1: SHOULD THE ICA PROVIDE THAT WHEN LEVEL 3 IS THE RECORDING COMPANY, IT WILL PROVIDE USAGE DETAIL ACCORDING TO MECAB STANDARDS?

Level 3's brief confirms that this issue should be resolved in favor of SBC for the reasons set forth in SBC's brief, at 211-12. Level 3 contends that all it wants is

the *option* to agree with SBC on another format in anticipation of major changes in the current access charge regime. In other words, Level 3 only asks that the Agreement give the Parties the flexibility to agree to another method of exchanging billing records when the access charge regime is reformed.

Level 3 Br. at 216.

There are two glaring problems with Level 3's position. First, there is no need for the parties' contract to say the parties can agree on something; if they want to agree on something, they will do so – they do not have to give themselves permission beforehand. Second, Level 3 is not proposing language that would give the parties the option to agree on an alternative anyway. In fact, Level 3 is not proposing any language on this issue. Rather, the only question presented is whether the following language, proposed by SBC, will be included in the ICA:

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.

Since Level 3 agrees that that will be the rule unless and until the parties agree otherwise (Level 3 Br. at 216), there is no argument for not including SBC's language in the agreement.³⁷

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?

The Commission should resolve this issue in favor of SBC for the reasons set forth in SBC's initial brief, at pp. 213-14, and in the discussion of Recording Issue 1 above.

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?

Level 3 treats this issue as a mere addendum to the parties' dispute concerning whether Level 3 can use local interconnection trunks for interexchange traffic. *See* Level 3 Br. at 214-15. That is not the case, however, and Level 3 has offered no response to the SS7-specific arguments that SBC has set forth in support of its position on this issue. *See* SBC Br. at 214-19.

There is a crucially important difference between the interconnection trunking issue and the SS7 issue that Level 3 ignores and that provides a separate and independent reason to resolve this issue in favor of SBC. The difference is that the debate about the use of interconnection trunks arises in a context where SBC actually has a duty to Level 3 under the 1996 Act, while the debate about the use of SS7 quad links does not. SBC is obliged to provide interconnection to Level 3 for the exchange of traffic between SBC and Level 3 acting as a CLEC, and that

³⁷ SBC would not particularly object to adding language at the end of the quoted sentence that says the parties can agree otherwise, but such an addition would be silly. If it belongs here, it belongs after every provision in the ICA, because the parties can always agree otherwise.

necessarily means there will be interconnection trunks. Thus, there is (at least in theory) a starting point in the Act for the disagreement about whether Level 3 may use the local interconnection trunks for interexchange traffic; SBC believes it is very clear that the trunking disagreement should be resolved in SBC's favor for the reasons SBC has presented, but at least there is an underlying duty – the interconnection duty – that gives rise to the debate.

The SS7 issue is different, because SBC has no obligation under the 1996 Act to provide SS7 services to Level 3 at all. As SBC witness Carol Chapman explained in detail (SBC Ex. 2.0 (Chapman Direct) at 10-11), the FCC ruled in the *Triennial Review Order* (at ¶¶ 544-545) that ILECs are no longer obligated to provide SS7 signaling services to facilities-based CLECs. There is no indication in Level 3's position statement in the SS7 DPL, or in Level 3's testimony, or in Level 3's brief that Level 3 disputes this.

Even though SBC has no duty to provide SS7 services to Level 3 under this interconnection agreement, SBC has offered to share the costs associated with establishing SS7 quad links between SBC and Level 3, and to exchange traffic through those quad links on a bill-and-keep basis, but only if the links are used only for Level 3's CLEC calls, and not for calls that are subject to traditional access compensation. *See* SBC Ex. 2.0 (Chapman Direct) at 12-13. If Level 3 is not willing to accept that limitation, then SBC is not willing to enter into the arrangement at all, and Level 3 can purchase SS7 services from SBC pursuant to SBC's access tariff. *See id.* at 12.

Accordingly, and also for the reasons set forth in SBC's initial brief, particularly including this Commission's resolution of a very similar issue in SBC's favor last year (*see* SBC Br. at 218-19) this issue must be resolved in favor of SBC.³⁸

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?

Level 3's brief on the Appendix UNE continues to ignore the explicit language of the FCC's August 20, 2004 *Interim Order*³⁹ and the explicit requirements of the *Triennial Review Order*⁴⁰ and *USTA II*.⁴¹ As demonstrated in SBC's initial brief and Mr. Silver's testimony, Level 3's proposal to simply re-use the UNE language from its old interconnection agreement, which takes no account of the *TRO* or *USTA II*, suffers from three fatal flaws that prohibit it from being adopted here:

- (1) Level 3 assumes the *Interim Order*'s requirements apply to new interconnection agreements. As the FCC *expressly* stated in the *Interim Order*, however,

³⁸ To avoid possible misunderstanding, SBC notes that the fact that SBC is no longer required to provide SS7 services to facilities-based CLECs does *not* mean that SBC can decline to make use of its own SS7 network in the usual way when it is exchanging traffic with those CLECs. The issue has nothing to do with, for example, SBC using its SS7 facilities in the usual way for purposes of call set-up and routing. Rather, it has to do with SBC providing access to its facilities to Level 3 so that Level 3 can perform those functions on its end, and it is this that SBC is no longer required to do.

³⁹ Order and Notice of Proposed Rulemaking, *In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 2004 WL 1900394 (rel. Aug. 20, 2004) ("*Interim Order*").

⁴⁰ 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, *see USTA II*).

⁴¹ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 9D.C. Cir. 2004) ("*USTA II*").

its interim approach “forecloses the implementation and propagation of the vacated [unbundling] rules” in the “arbitration of new contracts,” and thus “does not enable competing carriers to do” what Level 3 is trying to do here. *Interim Order*, ¶ 23; *see also* Opposition of Respondents [FCC] to Petition for Writ of Mandamus, at 2, *USTA v. FCC*, No. 00-1012 (D.C. Cir., filed Sept. 16, 2004) (FCC explaining that the *Interim Order* “made clear that its interim rules would not permit CLECs to obtain new contracts under the vacated rules”).

(2) Even if the *Interim Order*’s requirements could apply to new agreements, those requirements will expire no later than March 13, 2005 (six months from publication of the *Interim Order*). *Interim Order*, ¶ 1; Staff Br. at 48. Level 3, however, ignores that expiration date, and instead would require SBC to litigate lengthy change-of-law proceedings under the new agreement, even long after the *Interim Order* expires. *See* Level 3 Br. at 147.

(3) Even if the *Interim Order*’s requirements could apply to new agreements, Level 3’s proposed language requires or may require unbundling of several elements – *e.g.*, OCn loops, feeder subloops, DS0 dedicated transport, entrance facilities, and enterprise-market switching, as well as SS7, call-related databases, and shared transport independently from unbundled switching – that the *TRO* held do *not* have to be unbundled and that are not affected or revived by the *Interim Order*. SBC Ex. 10.0 (Silver Direct) at 5-7. Level 3 never even bothers to deny this fact.

Given these fundamental flaws, Level 3’s proposed language cannot be adopted. Indeed, Level 3 appears to recognize this, for rather than defend its language or refute these criticisms, it now claims that the *Interim Order* somehow prohibits the arbitration of *any* new UNE terms

until the FCC issues new rules, and that in the meantime the Commission should (1) adopt the outdated UNE provisions from Level 3's old interconnection agreement, which pre-dates the *TRO* and *USTA II*, and (2) force SBC to litigate change-of-law proceedings after the FCC issues new rules and thus endure months or years of delay to rid its contract of unbundling requirements that have *already* been removed by the FCC and D.C. Circuit. Level 3 Br. at 143-52. That is exactly what the FCC sought to prevent in the *Interim Order* when it "forelose[d]" any re-imposition of vacated unbundling requirements in new interconnection agreements (*Interim Order*, ¶ 23) and when it said that "it would be unreasonable and contrary to public policy to preserve [unbundling requirements] rules for months or even years" when "the prior UNE rules have been vacated." *Triennial Review Order*, ¶ 705.

Staff unfortunately falls for Level 3's patently lawless approach, recommending that the Commission (1) adopt the outdated UNE language from the parties' prior agreement – even though Staff *admits* that it *does not comply with current federal law*; (2) also adopt SBC's proposed interim rider as part of the new agreement – even though the rider merely incorporates certain terms and condition of the prior agreement, and thus would be totally superfluous if Staff's first, illegal, recommendation were accepted; and (3) maintain the unlawful unbundling requirements of the old interconnection agreement for several months after the FCC issues new rules – even though the FCC said that "alterations" to agreements should "take effect *quickly* if our final rules in fact decline to require unbundling of the elements at issue." *Interim Order*, ¶¶ 22-23 (emphasis added).

Staff might as well propose explicitly that the Commission render a decision that is guaranteed to be reversed in federal court. The task of this Commission is to enforce unbundling law as it exists today, which means the FCC's unbundling regulations as they exist today.

47 U.S.C. § 252(c)(1). Federal law today flatly prohibits both Level 3's and Staff's proposals and fully supports SBC's. SBC's proposed Appendix UNE requires unbundling to the full extent required by current law, and SBC's proposed language is far more likely to comport with the FCC's forthcoming new rules, and thus require few alterations, given the FCC's direction to parties to assume that some or all of the unbundling rules vacated by *USTA II* would not be revived. *Interim Order*, ¶ 22. Accordingly, the Commission should adopt SBC's proposed language.

Response to Level 3. Level 3 argues that the Commission should do nothing on UNEs, claiming that any action would be “premature” and that “[t]he *Interim Order* holds that Level 3 and SBC may not arbitrate new agreements until the FCC adopts permanent rules for the provision of unbundled network elements.” Level 3 Br. at 143, 145. Level 3 cites no authority for that position, for there is none. To the contrary, the FCC recognized that parties may have been in mid-arbitration or in negotiations when the *Interim Order* came out, and thus, as a result of the strict statutory deadlines of Section 252, might be entering into new agreements before any new unbundling rules take effect. Paragraph 23 of the *Interim Order* addresses that scenario by expressly declaring that the interim requirements do not and cannot apply to such new interconnection agreements.⁴² If the *Interim Order* precluded the arbitration of any new agreements until the FCC issues new unbundling rules, as Level 3 argues, then this entire proceeding is unlawful and Level 3 should have withdrawn its arbitration petition. Level 3 has not done so.⁴³

⁴² Level 3 admits to being “somewhat bewildered” about how to read the *Interim Order* (Level 3 Br. at 144), but that is only because every rational reading of the order defeats Level 3's absurd position.

⁴³ Of course, even if Level 3 had withdrawn its arbitration request, the *Interim Order*'s requirements still would expire no later than March 13, 2005.

Furthermore, Level 3 does not really want the Commission to do nothing. To the contrary, Level 3 has asked the Commission to adopt, as part of the *new* agreement being arbitrated here, the outdated UNE language it has submitted from the parties' prior agreement⁴⁴ – language that requires unbundling of elements that the *TRO* and *USTA II* prohibit. Level 3 Ex. 1.0 (Hunt Direct) at 61. Level 3 cannot ask the Commission to “do nothing” and at the same time impose language on SBC as part of a *new* contract. The only way to “do nothing” would be to have no UNE Appendix, at all, though Level 3 ignores that option.

Similarly, contrary to its claim (at 147-48) Level 3 does not merely want the Commission to enforce the *Interim Order*'s requirements in the new agreement until the FCC issues new rules. If that were Level 3's intent, it would have accepted SBC's interim rider proposal, which offers Level 3 everything required by the *Interim Order* for as long as that order remains in effect.⁴⁵ SBC Ex. 10.0 (Silver Direct) at 11-12. No, Level 3 wants much more than even the *Interim Order* would give it. Primarily, it wants to keep the old, unlawful unbundling requirements in place for as long as possible – despite the declassification of most former UNEs by the *TRO* and *USTA II*. See SBC Ex. 10.0 (Silver Direct) at 5-7. Indeed, Level 3 frankly admits that, under its proposal, SBC would have to “serve an appropriate notice” and go through a dispute resolution process to remove an unbundling requirement element from the new agreement after the FCC issues new rules *even if* the element in question had *already* been declassified by the *TRO* or *USTA II*, and thus never should have been in the contract to begin with. Level 3 Br. at 147.

⁴⁴ See Level 3's Proposed Appendix UNE.

⁴⁵ Level 3 objects to the rider (Level 3 Br. at 149-50), but its claims are baseless, as explained in SBC's response to Level 3's motion to strike portions of Mr. Silver's testimony.

For example, as of today there is no requirement to include unbundled entrance facilities in a new agreement. *See USTA II*, 359 F.3d at 585-86; *TRO*, ¶¶ 365-68; *XO Arbitration Decision*, ICC Docket No. 04-0371, at 78 (Oct. 28, 2004). Under Level 3’s proposal, however, SBC would have to keep providing unbundled entrance facilities under the new agreement (because they were included in the old agreement (*see* SBC Ex. 10.0 (Silver Direct) at 5) until it completed a change-of-law process to remove that requirement after the FCC issues new rules. Level 3 Br. at 166-67. That could take several months or longer, given that Level 3 will have no incentive to conform its contract to the controlling law and has already shown its willingness to evade the FCC’s rulings by any means. The cost and burden of that delay should not fall on SBC. If there is no valid, effective FCC rule requiring an element to be unbundled at the time the agreement is approved, the agreement obviously should not (and cannot) require unbundling of that element. 47 U.S.C. § 252(c)(1) & (e)(2)(B) (state commission’s role is to ensure that agreements conform to Section 251 and FCC rules implementing Section 251).

Level 3 should not be allowed to achieve by delay what it could not achieve at the FCC or D.C. Circuit – namely, the perpetuation of unlawful unbundling requirements. Even in the *TRO*, the FCC made clear that when “prior UNE rules have been vacated and replaced . . . by new rules, . . . it would be unreasonable and contrary to public policy to preserve [the vacated] rules for months or even years.” *TRO*, ¶ 705. Yet that is precisely what Level 3 seeks to do here – use a “foreclose[d]” reading of the *Interim Order* (¶ 23) to create contract provisions that perpetuate unlawful unbundling requirements that could take SBC “months or even years” to remove. That is not only unlawful, but also flies in the face of the FCC’s direction that its new decisions should “take effect quickly if our final rules in fact decline to require unbundling of the elements at issue.” *Interim Order*, ¶ 23. SBC’s proposed language would achieve that goal

because, consistent with current law, it does not require unbundling of any of the elements addressed by the *Interim Order* and therefore will require no changes when, as the FCC told parties to assume it would, the FCC issues rules that preclude unbundling of those elements. *Id.*, ¶ 22.

Having misconstrued the *Interim Order*, SBC's position, and the effect of its own position, Level 3 accuses SBC of making an "overplay" and trying to "sneak" contract provisions past the Commission "in hopes of finding [it] off guard." Level 3 Br. at 150-51. Leaving the overblown rhetoric aside, the fact is that Level 3 refuses to acknowledge the current state of the law:

Entrance Facilities. Level 3 admits that "Entrance Facility UNEs . . . were eliminated by the *TRO*," but then claims they "must" be unbundled anyway because the D.C. Circuit remanded the FCC's ruling on entrance facilities for further explanation. Level 3 Br. at 152. There is a big difference, however, between remanding a decision for further explanation and actually vacating a decision. *See, e.g.,* Order, *Petition of Core Comms., Inc. for Forbearance*, 2004 WL 2341235, at ¶ 10 (FCC, rel. Oct. 18, 2004) (noting that where D.C. Circuit "remanded, but did not vacate" an FCC order, the order "remain[s] in effect while the court remand is under review"). The D.C. Circuit vacated many aspects of the *TRO*, but merely remanded the decision on entrance facilities. *USTA II*, 359 F.3d at 586. Thus, the *TRO*'s ruling on entrance facilities stands, and there is no law that currently requires unbundling of those facilities and no reason to think the FCC will reach any different conclusion than it did in the *TRO*. Moreover, the Commission already refused to require unbundling of entrance facilities in the *XO Arbitration*, ICC Dkt. No. 04-0371, at 78.

DS1/DS3/Dark Fiber Dedicated Transport. Level 3 admits that *USTA II* “vacated” the unbundling rules for DS1/DS3/dark fiber dedicated transport, but nevertheless says that SBC “must” keep unbundling those elements until the FCC issues new rules. Level 3 Br. at 153. That is not how the law works (*see TRO*, ¶ 705), which is why Level 3 fails to cite any authority for its claim. The D.C. Circuit vacated those unbundling rules and its mandate has issued. *USTA II*, 359 F.3d at 575-77. Thus, there are no rules in place that require SBC to unbundle those elements.

DS1 and DS3 Loops. Level 3 claims *USTA II* did not vacate the unbundling rules for DS1 and DS3 loops. Level 3 Br. at 154. But *USTA II* unquestionably vacated those rules. The court expressly vacated “those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements” (*USTA II*, 359 F.3d at 568), a statement that encompasses the FCC’s treatment of both high-capacity loops and transport. *See TRO*, ¶¶ 328, 394. Moreover, the D.C. Circuit specifically referred to the vacatur of the Commission’s “transport” rules, and made clear that this term included “transmission facilities dedicated to a single customer” – which is how the FCC defines a “loop.” *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a) (defining “loop”). The court’s unified treatment of high-capacity loops and transport was also consistent with the manner in which the ILEC petitioners briefed the issue, by addressing both loops and transport simultaneously. Finally, the two substantive flaws the court identified with respect to the FCC’s analysis of high-capacity facilities – considering impairment on a route-specific basis and the failure to consider the availability of special access (*see USTA II*, 359 F.3d at 575, 577) – apply equally to the FCC’s determinations as to both loops and transport. *See TRO*, ¶¶ 102, 332, 341, 401, 407.

EELs. Level 3 discusses the *USTA II* ruling on eligibility criteria for EELs, arguing that ILECs are still required to provide both new and existing combinations of UNEs that make up EELs. Level 3 Br. at 155. That discussion is irrelevant because all EELs include unbundled dedicated transport (*see TRO*, ¶ 575), and at this time, after *USTA II*, there is no law that requires unbundling of dedicated transport. Level 3 therefore fails to state any basis for including EELs in the new agreement, much less adopting the entire UNE Appendix from the old agreement.

HFPL. Level 3 claims that “SBC has continuing obligations to make line sharing available to all of Level 3’s existing line sharing end user customers and to make line sharing for new customers available for a three-year period.” Level 3 Br. at 176. This argument is irrelevant: Level 3’s proposed Appendix UNE does not even provide for HFPLs, meaning that Level 3 is not seeking any HFPL language for the new agreement.

Mass-Market Local Switching. Level 3 admits that *USTA II* “vacated” the FCC’s rule on the unbundling of mass-market local switching, but nevertheless contends that SBC must provide that declassified UNE under the *Interim Order*. Level 3 Br. at 157. As explained above and in SBC’s initial brief, paragraph 23 of the *Interim Order* expressly forecloses that argument.

Section 271. Level 3’s final argument is that SBC must unbundle all sorts of network elements under section 271 of the 1996 Act. Level 3 Br. at 158-60. As SBC has explained, however (SBC Br. at 224-25), Level 3’s reliance on section 271 fails, for several reasons: *First*, any requirements that might exist under section 271 are separate and apart from the requirements of section 251 and are not enforceable or arbitrable under section 252. The *only* duties the Act requires incumbent LECs to negotiate are the duties imposed by sections 251(b) and 251(c) (*see* section 252(c)(1), which identifies the terms and conditions that are subject to negotiation); and the only duties that are subject to arbitration are those that are subject to negotiation (*see*

section 252(b)). *Second*, 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. Under section 271 (very much unlike section 252), the state commission has no role or authority except as a consultant to the FCC. *See* 47 U.S.C. § 271(d)(2)(B). Thus, as the Seventh Circuit has held, a state commission may not “parlay its limited role in issuing a recommendation under section 271” to impose substantive requirements under the guise of Section 271 authority. *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004). *Third*, 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. *Fourth*, Level 3 is seeking access to elements under section 271 as if they were section 251 UNEs and had to be provided at TELRIC-based prices. The Commission has flatly rejected that approach. *XO Arbitration*, ICC Dkt. No. 04-0371, at 48 (“Language requiring SBC to offer 271 UNEs, qua 271 UNEs, at TELRIC prices, is prohibited.”)

In short, Level 3’s proposed language should be rejected, because it requires unbundling far beyond that required by current law and is not in any way saved by the *Interim Order* or section 271. SBC’s proposal, by contrast, tracks the current unbundling law after the *TRO* and

USTA II and will allow for prompt updates as needed once the FCC issues new unbundling rules. SBC's Appendix UNE should therefore be adopted.

State law. Finally, Level 3 claims that "SBC is also obligated to unbundle pursuant to state statutes and orders." Level 3 Br. at 159. Level 3 fails to identify any specific statutes or orders or show how they could require unbundling of any of the specific elements in Level 3's proposed contract language, particularly when current federal law prohibits such unbundling. SBC, of course, is not obligated to guess at what legal authority Level 3 may be relying on or what elements it may be thinking of, so Level 3's argument is waived.

It is possible that Level 3 meant to rely on 220 ILCS 5/13-801 or 13-505.6 (though it did not cite either of them), but CLECs have tried such arguments before and the Commission has made clear that it "is not free to simply impose any unbundling regime [it] deem[s] proper under state law and without regard to the federal regime." Final Order on Reopening, ICC Dkt. No. 00-0393, at 42 (Sept. 28, 2004) ("*Project Pronto Reopening Order*"); *see also id.* at 43 (noting that CLECs had failed to explain how requiring unbundling under section 801 would be "consistent with federal law" that precluded unbundling of the elements at issue, just as Level 3 has failed to explain its position here); *id.* at 47 (finding that section 505.6 "does not mandate this Commission to take additional unbundling action beyond what the FCC requires"). Furthermore, while the Commission has interpreted section 801(d)(4) to require unbundling of certain pre-existing *combinations* of network elements (a decision that is now under reconsideration at the Commission's own request in Docket 01-0614), the prior decision interpreting section 801 in Docket 01-0614 did not require unbundling of any individual network elements without regard to the "necessary" and "impair" requirements of section 251(d)(2) of the 1996 Act. Indeed, the Commission's own rules, which were created after Section 801 took

effect, specifically state that the Commission can require unbundling only of (1) UNEs required by FCC rules, and (2) other UNEs that the Commission determines must be unbundled “consistent with the Federal Act, and [Illinois Public Utilities] Act, and decisions of the federal courts and the FCC.” 83 Ill. Adm. Code § 790.320 (2003). At present, nearly all of the former UNEs in Level 3’s proposed language are *not* “required by FCC rules,” for the FCC and the federal courts have determined that those elements have not met the federal standards for unbundling.

Moreover, the Seventh Circuit has found that it “cannot now imagine” how a state commission could ever require unbundling where the FCC has precluded it (*Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004), and this Commission has found that where “the FCC has made a national finding on the unbundling” of an element, “a contrary state finding would inevitably set up a conflict.” *Project Pronto Reopening Order* at 42. Finally, Level 3 has not presented any evidence that would allow the detailed analysis required by the necessary and impair standards for any of the now-unlawful UNEs in its old agreement. *See Order*, ICC Dkt. No. 099-0511, at 125, *modified in part*, Second Notice Order (Jan. 23, 2003) (“delineating specific UNEs involves a detailed process geared toward satisfying the requirements of TA96”). Accordingly, Level 3’s state-law theory is completely unexplained, unsupported by reference to any particular authority (much less by any analysis of the necessary and impair requirements of section 251(d)(2) of the 1996 Act), and contrary to governing federal law.

Response to Staff. Staff does not fully support either Level 3’s or SBC’s proposal, but its reasoning reflects an alarming misunderstanding of the issue and of SBC’s position. The mish-mash proposal that results from Staff’s confusion – to adopt both Level 3’s proposed language

and SBC's interim order rider and require further proceedings after new FCC rules come out (Staff Br. at 50) – is contrary to law and sound policy and should be rejected.

As noted above, Level 3's proposal suffers from three fatal flaws: it assumes the *Interim Order* applies to new contracts; it would enforce the *Interim Order*'s requirements long after they expire on March 13, 2005 or earlier; and it would require unbundling of several elements that the FCC refused to unbundle in the *TRO* and that are not covered by the *Interim Order*. Staff recognizes the latter two flaws. Staff Br. at 48.⁴⁶ Inexplicably, however, Staff's ultimate proposal (*id.* at 50) is to adopt Level 3's proposed language, which would propagate all three flaws noted above. There is no rational way to reconcile Staff's conclusion that Level 3's proposal is unlawful with Staff's recommendation that the Commission adopt it.

Staff's decision not to support SBC's proposal may result in substantial part from the fact that Staff misunderstands it. Staff apparently believes that SBC has asked the Commission to (1) adopts SBC's interim rider as the *only* UNE language in the new contract until the *Interim Order* expires, and (2) then “replace[]” that rider with SBC's proposed Appendix UNE after the FCC issues new rules. Staff Br. at 49. That is not at all what SBC has proposed, as Mr. Silver's testimony made clear. SBC Ex. 10.0 (Silver Direct) at 9. Thus, Staff's contention that “[i]t is unclear how SBC's proposal could be implemented” (Staff Br. at 49) is wrong, because Staff has not evaluated SBC's actual proposal.

⁴⁶ As Staff notes, while the Commission previously ordered SBC to incorporate a second six-month “transition period” under the *Interim Order* as part of a contract amendment, the FCC has since made clear that the second six-month transition period is merely a “proposal” on which the FCC sought comment, and that it has “no legal force whatsoever.” Staff Br. at 48; Opposition of Respondents [FCC] to Petition for a Writ of Mandamus, at 7-8, Case No. 00-1012 (D.C. Cir., filed Sept. 16, 2004). As Staff correctly concludes, the Commission could only ignore this statement “at its peril” and therefore should “assume” — because it is the law — “there is no currently effective federal Section 251 obligation for SBC to provide the UNEs referenced in the *Interim UNE Order* beyond six months from September 13, 2004.” Staff Br. at 48. Of course, the interim requirements also could expire earlier if the FCC's new rules take effect earlier. *Interim Order*, ¶ 1.

SBC's proposal is straight-forward:

The Commission should adopt SBC's proposed Appendix UNE. SBC Ex. 10.0 (Silver Direct) at 9 ("Under SBC's proposal, this UNE Appendix would take effect upon approval by the Commission."). It is the only proposal on the table that complies with current unbundling law after the *TRO* and *USTA II* and it is not likely to require much modification when the FCC issues its new unbundling rules.

If, *and only if*, the Commission believes the new agreement should in some way reflect the *Interim Order* (which it should not do, since the *Interim Order* expressly says, at ¶ 23, that it is not to be implemented in new interconnection agreements), the Commission could achieve that end by adopting SBC's interim order rider as an addendum to the *new* agreement which, again, will include SBC's proposed UNE Appendix. SBC Ex. 10.0 (Silver Direct) at 12. With respect only to the elements covered by the *Interim Order* (mass-market switching, enterprise-market loops, and dedicated transport (*Interim Order*, ¶ 1)), that rider would supersede SBC's new Appendix UNE and require unbundling of those elements until the *Interim Order*'s requirements expire on March 13, 2005 or earlier, at which point the rider would also expire. SBC Ex. 10.0 (Silver Direct) at 12.

Thus, while Staff believes that "SBC's proposal would relieve SBC from providing UNEs that are unaffected by the [*Interim Order*] freeze and which the FCC rules require SBC to continue providing" (Staff Br. at 49), that is absolutely wrong, for SBC's Appendix UNE requires unbundling of all elements that are required by law and "unaffected by the freeze," such as NIDS, 2-wire analog loops, and OSS, and SBC proposes to have that language take effect from the outset. SBC Ex. 10.0 (Silver Direct) at 9; SBC Appendix UNE, §§ 7-9 and 17. Indeed, even Level 3 has never claimed that SBC failed to offer unbundling to the full extent required outside the *Interim Order*. Similarly, Staff's claim that SBC's rider is designed to attach to the old interconnection agreement (Staff Br., at 49) is plainly wrong, for as Mr. Silver clearly explained, and the terms of the rider show, that rider it would attach only to the *new* interconnection agreement. SBC Ex. 10.0 (Silver Direct) at 12 ("SBC would offer to include a

Rider to the *new* ICA”; “The *Interim Order* exclusion temporary rider is designed to be added to the *new* agreement”) (emphasis added).

Had Staff evaluated SBC’s actual proposal, Staff might well have supported it. Staff’s intent seems to be to ensure that Level 3 receives the benefits of the *Interim Order* while they are in effect. While the *Interim Order* expressly bars such a requirement in a new contract, SBC’s proposal to include both its Appendix UNE and the interim rider in the new agreement fully achieves Staff’s goal of giving Level 3 the benefit of the *Interim Order* as well as any other unbundling still required by the *TRO* after *USTA II*. The only difference is that SBC’s proposal would not allow the requirements of the *Interim Order* to remain in place after they expire, whereas Staff’s and Level 3’s proposals would illegally and improperly keep those expired requirements in place for many months after they have ended.

One final point bears mentioning. Staff criticizes “the parties” for asking the Commission to make an “all or nothing” decision on which UNE language to adopt, and later criticizes SBC for “fail[ing] to support” its specific contract language. Staff Br. at 46. Those criticisms are unfair and unfounded. SBC was ready, willing, and able to arbitrate the UNE issues in the normal manner, as a series of disputes about specific contract provisions. Indeed, the parties spent months negotiating with SBC’s proposed Appendix UNE and had identified more than 35 specific disputes. Just before DPLs were due in August, however, Level 3 relied on the *Interim Order* to reformulate the debate entirely by abandoning the prior negotiation results, proposing a completely new UNE appendix (the one from the old agreement), and refusing to address the previously identified language disputes. The effect of this dramatic change in position was to turn the UNE issues into a single all-or-nothing question: Whose appendix should be adopted? SBC and Level 3 accordingly revised their DPL to reflect the new

state of affairs that Level 3 had created. Level 3 then filed testimony that again addressed the issue in an all-or-nothing fashion, and did not criticize *any* of the specific contract language proposed by SBC. *See* Level 3 Ex. 1.0 (Hunt Direct) at 56-61.

Given that course of events, Level 3 voluntarily forfeited any right to challenge any specific aspects of SBC's proposed language, for it has elected to roll the dice on an all-or-nothing gamble. As a result, SBC had no need or obligation to provide testimony or briefs in support of every provision of its contract language. And even if such a duty existed, Level 3 would bear it too, yet Level 3 failed to provide any defense of its specific contract language, even after Mr. Silver pointed out the several serious flaws in that language. SBC Ex. 10.0 (Silver Direct) at 3-8. Staff's attempt to blame SBC for any unusual positioning of the UNE dispute is thus baseless and unfair, for it is Level 3 alone that turned the UNE portion of this case into an all-or-nothing issue with its *Interim Order* strategy.

Having said that, we add that our point is not that Level 3's all-or-nothing gambit was improper. Indeed, Staff's criticism, in addition to being inappropriately directed at SBC, also reflects a misunderstanding of who defines the issues for arbitration under section 252, and of the proper role of the state commission under that statute. If the parties join in presenting a single, broad issue that can rationally be resolved under the 1996 Act, that is the issue that the state commission should resolve, notwithstanding that the dispute may encompass a great deal of disputed contract language. Merely by way of example, a CLEC could propose a detailed appendix of terms and conditions for a new form of collocation and the ILEC could choose to oppose the appendix on the sole ground that that form of collocation is not permissible under the 1996 Act; whether to also dispute the particular terms and conditions proposed by the CLEC is up to the ILEC. In that scenario, the state commission's responsibility would be to decide the

issue presented and, consequently, to adopt in the arbitration either the entire appendix or none of it. And it emphatically would not be the role of the state commission in the arbitration (or of the state commission Staff) to critique the particulars of the proposed appendix. The state commission's (and Staff's) opportunity to do that comes later: If, in the hypothetical, the Commission decided the appendix for the new form of collocation should be adopted, on the ground that the new form of collocation is permissible, the Commission could nonetheless, when it came time to approve the appendix as part of the conforming interconnection agreement the parties file after the arbitration, reject portions that it concludes are discriminatory or contrary to the public interest. *See* 47 U.S.C. § 252 (e).

Level 3's proposal is plainly unlawful for all the reasons we have discussed. SBC's proposal, in contrast, accurately tracks current unbundling law, and Staff might well have supported SBC's approach if it had evaluated it. For these reasons, the Commission should adopt SBC's Appendix UNE and reject Level 3's proposal to carry forward into the new agreement the in large part unlawful UNE Appendix from the parties' old agreement.

Respectfully submitted,

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Dated: November 24, 2004

CERTIFICATE OF SERVICE

I, Dennis G. Friedman, an attorney, hereby certify that I caused a copy of the foregoing **SBC ILLINOIS' POST-HEARING REPLY BRIEF** to be served on the following parties via email on the 24th day of November, 2004.

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