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.	)	Docket No. 04-0428

SBC ILLINOIS' REPLY BRIEF ON EXCEPTIONS

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Illinois Bell Telephone Company ("SBC Illinois") respectfully submits its reply to the exceptions of Staff and Level 3 to the Administrative Law Judge's Proposed Arbitration Decision ("PAD").

Staff Exceptions on Issues IC-11(a), IC-15, and DEF-8.

Staff excepts to the PAD's recommendation that all traffic bound to an ISP be subject to the *ISP Remand Order*'s $0.0007 interim compensation rate. SBC agrees with Staff. As Staff explains, "when a customer places a 1+ toll call through its long distance carrier to connect to an ISP in a distant state" that is still a traditional long distance call to which access charges apply. Staff BOE at 4. And with respect to FX traffic, as Staff explains, the Commission "previously determined that a bill and keep resolution is fully consistent with the rules and regulations established by the FCC," citing the Commission's decision in the AT&T/SBC arbitration. *Id.* at 5. In short, as Staff states, "Commission policy objectives, federal rules, and past Commission findings all suggest that the parties should be ordered to exchange ISP-bound FX or FX-like traffic under a bill and keep regime, not at reciprocal compensation rates of $0.0007 per minute of use as directed by the PAD." *Id.* at 7.

Level 3 Exception One – ITR-1, ITR-18(c), ITR-19, IC-2(a), (c)-(j), IC-4(a) and (c), IC-8, IC-9.

Level 3 agrees with the PAD's recommendation that the Commission decline to decide any issues related to IP-PSTN traffic. Level 3, however, requests certain clarifications. Level 3 BOE at 6-7. The Commission should reject the PAD's recommendation on this issue, and Level 3's requested clarifications. As SBC explained in its exceptions, interexchange IP-PSTN traffic is subject to access charges under the FCC's current intercarrier compensation regime, and the Commission should rule accordingly. Moreover, because interexchange IP-PSTN traffic is subject to access charges like other interexchange traffic, it should be routed over the same Feature Group D access trunks that carry other interexchange traffic, and that allow carriers to appropriately assess access charges.

However, if the Commission adopts the PAD's recommendation to decline to decide IP-PSTN traffic issues in this arbitration, then Level 3's requested clarifications may be appropriate – with one further clarification. If the Commission clarifies that it is not approving "SBC's practice of requiring Level 3 to establish Feature Group D access trunks to exchange IP Enabled traffic" (Level 3 BOE at 7), then the Commission should also clarify that it is not approving Level 3's proposal to exchange IP-enabled traffic over local interconnection trunks. The parties' interconnection agreement ("Agreement") should be completely silent on the issue.

Level 3 Exception Two – ITR-11, ITR-12, ITR-18(c), IC-4(a).

Level 3's exception is a mere re-hash of the arguments it presented in its briefs. The ALJ carefully considered these arguments and properly rejected them. Instead, the ALJ choose to follow the well-established precedent in Illinois – most recently re-affirmed in the MCI arbitration late last year – that Local/intraLATA toll and access traffic should be routed over

separate trunk groups. Level 3's exception on these issues does not reveal any defect in the ALJ's decision.

The PAD correctly found that Level 3 should continue to deliver jurisdictionally distinct traffic over separate trunk groups – with local traffic delivered over local interconnection trunk groups and interexchange access traffic delivered over Feature Group D access trunks. That recommendation is consistent with Level 3's current practice and is correct for several reasons: *First*, terms and conditions applicable to the exchange of traffic between SBC and Level 3, where Level 3 is acting as an IXC, do not fall within the parameters of section 251 of the 1996 Act. Such terms and conditions therefore are not properly the subject of a section 251/252 interconnection agreement. *See* SBC Br. at 155-157; SBC Reply Br. at 81-86. *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. *See* SBC Br. at 157-159; SBC Reply Br. at 86-89. *Third*, Level 3's proposal to combine local/IntraLATA toll traffic with interexchange access traffic on the same trunk group would create intractable billing problems without any discernible upside. *See* SBC Br. at 159-164; SBC Reply Br. at 91-96.

The PAD is consistent with Level 3's current practice of carrying jurisdictionally distinct traffic over separate trunk groups. Level 3 does not (and cannot) dispute that the PAD preserves the parties' current arrangement. 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.[1] Moreover, in this and other states, Level 3 currently abides by the federal access tariff requirement that interexchange access traffic be delivered over Feature Group D trunks. It does so through the use of IXC partners. Level 3 concedes that because it allegedly does not have Feature Group D trunks, its interexchange access traffic is not directly terminated to the SBC network. Instead, Level 3 hands off that traffic to a number of IXC partners who then deliver the traffic to the SBC network over Feature Group D trunks. Tr. (Hunt Cross) at 140-146, 160-161, 165-166, 202-203, 213-215.

Level 3 argues that the PAD "force[s]" Level 3 "to purchase Feature Group D access trunks." Level 3 BOE at 5. *See* also Level 3 BOE at 11 (stating that the PAD "forc[es] Level 3 to purchase and establish an entirely new, duplicative and inefficient network") and 18 (stating that the "PAD's conclusion [ ] forces Level 3 to build out an entirely new network of Feature Group Access trunks in order to exchange IP-in-the-Middle traffic"). Contrary to Level 3's claim, nothing in the PAD precludes Level 3 from doing what it currently does – *i.e.*, deliver local traffic over local interconnection trunk groups and deliver interexchange access traffic over Feature Group D trunks via IXC partners. In fact, Staff recognized that SBC's proposal adopted by the ALJ "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." Staff Br. at 41. If Level 3 continues to deliver its interexchange access traffic to SBC in this manner, it will not have to establish its own Feature Group D access

[1] 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.

trunks (assuming it has not already done so).[2] Under the PAD, Level 3 would have to establish a Feature Group D access trunk group only if it decides to no longer use IXC partners to carry Level 3's interstate interexchange access traffic to SBC's network. Moreover, the requirement to carry interstate interexchange access traffic over Feature Group D access trunks 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.[3] *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 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.

Even if Level 3 were correct that the PAD "forc[es] Level 3 to purchase and establish an entirely new, duplicative and inefficient network" (which it is not), Level 3's complaint about the increased cost associated with separate trunk groups is without merit. As Staff correctly observed, Level 3's estimate for additional capacity it would need to handle the access traffic "does not appear accurate" (Staff Br. at 38) and the evidence suggests that "the cost of establishing separate trunk groups . . . is [not] particularly significant" (*id.* at 40).

In its exceptions, Level 3 makes false statements in an attempt to disguise the fact that it currently utilizes separate trunk groups for local and interexchange access traffic – just as the

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[2] Level 3 does not contend that its current practice of using IXC partners is not working or that it cannot continue to use IXC partners for the delivery of its interexchange access traffic in the future.

[3] Level 3 argues that "the ALJ has adopted language that imposes a duty that all Switched Access Traffic be delivered over Feature Group Access Trunks." But, again, the requirement to carry interstate interexchange access traffic over Feature Group D trunks is a federal access tariff requirement. The PAD simply adopted – as it must – language consistent with federal law requirements.

PAD requires here. For example, Level 3 claims that "the current agreement with Level 3 allows the Parties to exchange traffic over trunk groups that are not dedicated to any particular type of call." Level 3 BOE at 22. The parties' current interconnection agreement does no such thing. To the contrary, it requires Level 3 to deliver local/intraLATA traffic over local interconnection trunk groups and to deliver traffic exchanged between Level 3 customers and IXCs over meet point trunk groups.[4] The agreement is *silent* concerning trunking arrangements for interLATA interexchange access traffic that Level 3 delivers to SBC and the SBC delivers to Level 3. When Level 3 delivers interexchange interLATA traffic to SBC, it is acting as an IXC. And an interexchange carrier's rights and obligations are *not* governed by section 251 and 252 of the 1996 Act; rather, they are governed by state and federal access tariffs. Consistent with federal tariff requirements, Level 3 delivers interLATA interexchange access traffic to SBC over Feature Group D trunks groups via Level 3's IXC partners – not over local interconnection trunk groups.[5] And the PAD, as it must, requires Level 3 to continue to abide by that federal tariff requirement.

Level 3 even goes so far as to claim that it is "standard in the industry" to exchange all forms of traffic over a single interconnection trunk group. Level 3 BOE at 15. Level 3 cites no record support for this claim, because there is none. In Illinois, the Commission has consistently required CLECs to carry jurisdictionally distinct traffic over separate trunk groups.

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[4] *See* 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.

[5] Level 3's claim (Level 3 BOE at 11) that it "does not have any Feature Group D access trunks" is misleading. The reason Level 3 has never needed to establish such trunk groups is not that Level 3 does not provide services that utilize Feature Group D trunks. Rather, it is that Level 3 hands off its interexchange access traffic to IXC partners that deliver the traffic to SBC's network over their own Feature Group D trunks.

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. See SBC Br. at 155-57; SBC Reply at 81-86. Level 3 argues it is "technically feasible" to carry jurisdictionally distinct traffic over a single trunk group and, therefore, SBC has an obligation under the 1996 Act to permit such trunking arrangements. Level 3 BOE at 24. There is no law that permits Level 3 to utilize any trunking arrangement that is technically feasible. Level 3 claims that section 251(c)(2) creates such a right (*see* Level 3 BOE at 74), but the PAD correctly rejected that claim:

> [The] right to interconnect facilities and equipment does not, on its face, create a right to a particular trunking arrangement. That more particular right must come from some statutory provision or from an FCC decision or rule.
>
> Level 3 contends that such a right is implied by the subsection 251(c)(2)(B) ILEC duty to accommodate CLEC interconnection "at any technically feasible point with the [ILEC's] network." While that provision empowers a CLEC to determine where interconnection will occur (and to insist upon a single point of interconnection), it does not – either by its terms or pursuant to FCC interpretation – confer a right to a specific trunking arrangement.

PAD at 93.[6]

The ALJ is correct. Section 251(c) has 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

[6] Level 3 claims that section 251(c)(2)(A) "allow[s] Level 3 to choose the most efficient manner in which to exchange its Telephone Exchange and Exchange Access Traffic." Level 3 BOE at 20. As explained in the text, section 251(c)(2)(A) say nothing about trunking arrangements and, in any event, does not address the type of traffic at issue here (*i.e.*, interexchange access traffic).

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.

As for Level 3's suggestion that its commingling proposal must be adopted because section 251(c)(2)(A) "mandates that SBC exchange with Level 3 any exchange or exchange access service," Level 3 again misreads the law. Section 251(c)(2)(A) says nothing about *trunking* arrangements and there is certainly no language in section 251 that permits all traffic to be carried over the same trunk group.[8]

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). Level 3 BOE at 21-22. 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 can be carried over local interconnection trunk groups. And while Level 3 claims that SBC permits itself to commingle interexchange access traffic with local traffic on a single trunk group (Level 3 concedes, as it must, that SBC does not combine traffic on a single trunk group when it exchanges that traffic with a CLEC, Tr. (Gates Cross) at 282-283), the ALJ correctly rejected that claim finding (at 94): "SBC demonstrates that the pertinent trunking arrangements it proposes here are no different than the arrangements it has with its own affiliates" and "SBC's traffic mix *within* its local network transport is irrelevant to Level 3's discrimination case, which is about trunk routing *between* carriers." (Emphasis added).

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[8] Per my discussions with Kara, we are not going to make this argument.

IXC interexchange traffic delivered to the SBC local network by SBC's long distance affiliate 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. This is what happens to 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, that traffic is indeed commingled with local traffic on common transport trunks that run between the originating end office and SBC's access tandem. Once at the tandem, it is routed to the IXC affiliate *over Feature Group D access trunks.* That is precisely what happens to IXC-bound traffic directed to IXCs that purchase originating switched access from SBC, including Level 3. Hence – and as the ALJ correctly concluded – there is no difference in treatment and therefore no discrimination.

Level 3 claims that SBC has agreements in place with CLECs that permit the commingling of multiple types of traffic on the same trunk group. Level 3 BOE at 22. The agreements Level 3 refers to are arrangements outside of Illinois, and do not support Level 3's claim that it should be permitted to combine such traffic in Illinois. And history has shown that it should not be permitted to do so. As discussed further below, permitting CLECs to carry jurisdictionally distinct traffic over the same trunk group creates potentially intractable billing problems and an increased likelihood that carriers will engage in fraud to avoid paying the appropriate access charges. The fraud and billing problems have become more pronounced over time. SBC Ex. 1.0 (Albright Direct) at 35-37, 41-42. For example, innovations in technology such as the expanding growth of voice over internet protocol ("VoIP") and, in particular, the increased use of IP backbone networks to carry traditional voice transmission (*i.e.*, IP-in-the-middle traffic) have increased the risks associated with missing or altered CPN. *Id.* If Level 3 is

permitted to commingle interexchange access traffic with local traffic, it would degrade SBC's ability to accurately identify and bill for local and access traffic. *Id.*

Many state commissions (including this one) have rejected proposals to carry jurisdictionally distinct traffic on the same trunk group – even though some ILECs may have voluntarily agreed to such arrangements in the past. Indeed, although Level 3 urges the Commission to follow other state commission decisions that purportedly adopt commingling proposals (Level 3 BOE at 17-18), this and other state commission have rejected attempts to commingle jurisdictionally distinct traffic on the same trunk group. In Docket No. 96-0404, this 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/SBC arbitration.[9] And it did so again in the MCI/SBC arbitration,[10] stating that MCI "failed to substantiate its claim of

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[9] 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.

[10] Arbitration Decision, *MCI Metro Access Transmission Services, Inc. MCI WorldCom Communications, Inc., and Intermedia Communications Inc., 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*, Docket No. 04-0469 (Illinois Commerce Comm'n, November 30, 2004) ("*Illinois MCI Arbitration Decision*").

significant efficiency gains from combined trunking" and "failed to establish that the benefits of combined trunking, if any, outweigh the costs associated with the extra complexity in SBC's billing, or the extent of those costs." *Illinois MCI Arbitration Decision* at 102. The Commission further stated that it "views MCI's promise to make a good-faith effort to develop procedures for potential billing problems to be insufficient." *Id.* at 103.

Level 3 claims (at 17-18) that the Texas Commission has permitted the commingling of interexchange access and local traffic on the same trunk group, but that is not true. The Texas Commission specifically *excluded* interstate interexchange traffic from the traffic that may be put on local interconnection trunk groups – which is what Level 3 seeks to do here. The Texas Commission did so even though ILECs voluntarily agreed to such arrangements in the past – via so-called T2A agreements. The Commission stated: "[C]onsistent with the T2A interconnection agreement, the Commission permits Sprint to use multi-jurisdictional trunks, but the traffic combination is limited to local, intrastate intraLATA, and intrastate interLATA traffic."[11] This would not be an appropriate resolution in Illinois, but it does show that Level 3 has overstated the significance of the Texas decision it cites.

The *Virginia Arbitration Order* cited by Level 3 (at 23-24) does not support Level 3's position. As the PAD correctly notes (at p. 94), the FCC's Wireline Competition Bureau permitted only minimal volumes of busy line verification and emergency interrupt calls between

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[11] 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 GET Southwest Inc) d/b/a Verizon Southwest and Verizon Advanced Data Inc. under the Telecommunicat9ons Act of 1996 for rates, terms and conditions and related arrangements for interconnection,* Docket No. 24306, 2004 WL 370248, Texas PUC, Feb. 17, 2004) *2. See also 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.

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. Finally, as the PAD correctly notes, "the Bureau expressly stated that it was not interpreting or declaring rights and duties under Section 251 of the Federal Act, but determining the 'more reasonable' approach to trunking, based on the facts presented there." PAD at 94.

Level 3's proposal to commingle IXC-carried interexchange access traffic with local/intralata toll traffic on a single trunk group – the local interconnection trunk group – would create significant billing problems for SBC. Level 3 claims that "SBC has presented no evidence of an actual billing problem associated with carrying all forms of traffic over a single interconnection trunk group." Level 3 BOE at 10. As we demonstrate below, that is not true. But the PAD's resolution of the issue would be correct even if it were true. This Commission has repeatedly recognized it is preferable to carry jurisdictionally distinct traffic over separate trunk groups. The Commission would need to have a reasoned basis to deviate from its previous conclusion on this point, but Level 3 (as the ALJ correctly found) failed to provide any such basis. Indeed, Level 3 failed to provide any cost/benefit analysis showing that commingling local and interexchange access traffic on a single trunk group is preferable to separate trunk groups. In the absence of such evidence, the Commission's prior ruling must stand even if SBC had presented no evidence explaining the problems associated with commingling traffic.

In any event, SBC presented ample evidence of the billing problems associated with commingling interexchange access traffic and local traffic on a single trunk group. As SBC explained, software limitations prevent SBC from identifying the traffic it receives over

combined trunk groups. SBC Ex. 1.0 (Albright Direct) at 36. All traffic that is sent over a single trunk group will generate the same type of billing record. *Id*. Thus, if Level 3 were allowed to combine section 251(b)(5) and IntraLATA traffic with interexchange access traffic, it would be very difficult – if not impossible - for SBC to properly assess reciprocal compensation or access charges for the traffic coming over the combined trunk group. *Id.* at 36-37. In contrast, separate trunking for local/intraLATA toll and interexchange access traffic allows accurate tracking and billing of traffic exchanged between the carriers. *Id.* at 35-36. It permits SBC to readily distinguish between interexchange access traffic (which is billed at tariffed access rates) and section 251(b)(5) traffic (which is billed at the lower reciprocal compensation rate). *Id.* at 35-37. SBC also presented evidence regarding recent gaming among carriers in the industry to avoid access charges by the improper routing of access traffic over local interconnection trunk groups to take advantage of the lower reciprocal compensation rates. *Id.* at 37-38.

Even Level 3 concedes that its commingling proposal precludes real-time sorting of the various traffic types, among other things, because of technological limitations inherent in SBC's facilities and switches. *See, e.g.* Level 3's proposed language for section 3.2.2.4 of the IC Appendix. Level 3 admits that SBC's switches and facilities cannot capture the information necessary to identify and properly bill IXC-carried interexchange access traffic. *Id.* In addition, Level 3 concedes that its interexchange access traffic is currently delivered to SBC's network over Feature Group D access trunks – *obviously to ensure that SBC is paid the appropriate terminating access charges.* Tr. (Hunt Cross) at 140-146, 160-161, 165-166, 202-203, 213-215.

Level 3 responds that the billing problems can be resolved through the use of percent local use ("PLU"), percent interstate use ("PIU"), and percent of IP use ("PIPU") factors. According to Level 3 "there is ample evidence supporting Level 3's proposal to rely on call

records and jurisdictional allocators." Level 3 BOE at 9. That is incorrect, because Level 3's "factor" proposal appears nowhere in its proposed contract language. Level 3's proposed contract language 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 does mention the PIPU factor, Level 3's witness concedes that Level 3 has not developed or proposed any method for calculating the PIPU factor.[12] Instead, Level 3's proposed language provides that the parties will "agree to develop a Percentage of IP Use ('PIPU') factor." As for Level 3's suggestion that its factor proposal is "industry-accepted," that is not so. As even Level 3 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. (Wilson Cross) at 272-274.

Citing the testimony of SBC witness Sandra Douglas, Level 3 claims that the evidence "demonstrate[s] SBC's use of these allocators" and that "SBC currently relies on . . . factors for billing intercarrier compensation." Level 3 BOE at 13-14. What Level 3 fails to mention is that PIU factors have been used only as a fall back when SBC "do[es] not have sufficient call detail records." Tr. at 398-399. Moreover, this Commission has repeatedly held that it would not be reasonable for a CLEC to deliver all its traffic over one trunk group and then ask SBC to bill it based upon percentage factors developed between the parties. Equally important, even if PIU factors have been used in the past when call detail records are insufficient, PIPU factors have not

[12] 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").

been used – and, again, there is no industry standard for what should be put in the OLI field to designate IP-enabled or VoIP traffic.

Level 3's factor proposal does not provide any protection to SBC. 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 factor. 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 to ameliorate those problems.

The lack of proposed contract terms setting forth Level 3's proposal is only the beginning of Level 3's problems. Among other shortcomings, the process Level 3 attempts to describe would inevitably lead to significantly *under*compensated traffic. Factors are based on what happened in some past period and then applied to the current period to determine the categories to which current traffic should be assigned for billing purposes. 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. And here it is clear there will be a mismatch. There is little doubt that Level 3 expects the volume of interstate interexchange traffic it delivers to SBC will increase dramatically and continuously in the coming months and years. As a result, any factors that might be developed would always fail to reflect the current flow of traffic – they would significantly understate the amount of interexchange traffic in the current period.

Level 3 responds that SBC could audit the factors to determine their accuracy. But, again, Level 3 has not proposed any contract language that would accomplish this. Level 3 claims the FCC has adopted a Joint Board recommendation "to include PIU audits as a part of the dispute resolution mechanism in their access tariffs," and also cites the testimony of SBC witness Douglas about *tariffs* that purportedly provide audit rights for PIU factors. Level 3 BOE at 13-14. But any such tariff rights are inapplicable here. To begin with, there is nothing in the Agreement that would permit audit rights contained in a tariff to be incorporated into the ICA; and even if there were, there is nothing to suggest that the audit rights contained in the tariff would be sufficient for the purposes here. Level 3 makes the remarkable claim that its "contract proposal provides SBC the same options" as the tariff, but that is not true because Level 3's proposed contract language provides no audit rights. There is nothing in the contract that addresses the complicated scheme of perpetual calculations, audits, and true ups proposed by Level 3.

Finally, even if Level 3 had proposed language providing for an audit and true-up, its proposal would create an administrative headache and a fertile ground for ongoing debate and controversy. To begin with, the parties would have to spend a substantial amount of time and money just to reach agreement on the process for developing the factors. Assuming that could be done, any such process would, at a minimum, require the parties to examine and categorize millions of billing records over a discrete period of time to establish those factors. Then the parties would have to perpetually audit and recalculate the factors (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). The parties would waste even more resources attempting to resolve the inevitable disagreements that would arise over how often the

factors should be recalculated and over the accuracy of the recalculations themselves, just to provide a few examples. And the Commission would likely be called upon to resolve these disputes. Moreover, the results of each recalculation would immediately become outdated and would not reflect the *current* flow of traffic. What's more, the accuracy of any audit would again depend on data supplied by Level 3 (or any CLEC that opts into the Agreement that will result from this proceeding) – which could be easily manipulated. Of course, this ongoing process of audits, recalculations, and true-ups will be unnecessary if Level 3 carries interstate interexchange traffic on trunk groups separate from local traffic, as the PAD requires.

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 34-39. And that is what Level 3 currently does through its IXC partners. Tr. (Hunt Cross) at 140-146, 160-161, 165-166, 202-203, 213-215. Separate trunking for local/intraLATA toll and interexchange access traffic allows accurate tracking and billing of traffic exchanged between the carriers. SBC Ex. 1.0 (Albright Direct) at 34-39. Separate trunking also eliminates virtually all administrative expense and burden, because there would be no need to calculate, recalculate, review, and audit factors. And, 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 36-37).

Level 3 Exception Three – DEF-9, DEF-10, DEF-11, DEF-12, DEF-13, DEF-14, IC-1, IC-3, IC-6(a) and (b), IC-10(a) and (b), IC-13(b), (d) and (e).

Level 3's argument in Exception Three boils down to its claim that it should be permitted to commingle interexchange access traffic and local traffic on local interconnection trunk groups. The PAD correctly rejected Level 3's arguments on this point, as explained in SBC's response to Exception Two and in SBC's briefs. Level 3 argues that the words "exchange access" in section 251(c)(2)(A) permit it to carry interexchange access traffic on the same trunk group as local traffic.

Level 3's argument is flawed. The fact that section 251(c)(2) requires *interconnection* for the transmission and routing of "telephone exchange service and exchange access" is irrelevant to the definitions at issue here. The debate over GT&C Definitions 10-14 (definitions for "local interconnection trunk groups," "local/access tandem switch," "Local/intraLATA tandem switch," "local only tandem switch," and local only trunk groups) centers around (1) the type of traffic that different tandems are provisioned to handle – SBC proposed (and the ALJ agreed) that the various types of tandems be defined according to the type of traffic each is provisioned to handle, and (2) the type of traffic that may be delivered over local interconnection trunk groups – SBC proposed (and the ALJ agreed) that the definition of local interconnection trunk groups clarify that only local traffic (not interexchange access traffic) can be delivered over such trunk groups. These definitional issues have nothing to do with section 251(c)(2)(A) "interconnection" – *i.e.*, the physical linking of SBC's network and Level 3's network. Indeed, section 251(c)(2)(A) says nothing about tandems or trunking arrangements and does not permit all traffic to be carried over the same trunk group.

Level 3 Exception Four – DEF-3, IC-2(k), IC-11(b), IC-20(a), IC-21(a), ITR-18(d).

Level 3 objects to the PAD's rejection of Level 3's proposed term "Circuit-Switched IntraLATA Toll Traffic." Level 3's objection is without merit.

Level 3 suggests that "[t]hrough its orders and regulations, the FCC has distinguished between Circuit Switched Traffic and IP-Enabled Traffic." Level 3 BOE at 38. If that were the case, then one would expect Level 3 to cite at least one of these FCC orders or regulations – yet, Level 3 does not. Level 3 has not identified a single FCC order or regulation in which the FCC defined a category of "Circuit Switched Traffic" or "Circuit-Switched IntraLATA Toll Traffic."

Level 3 asserts the differentiation it proposes is necessary to make clear "that access charges apply to toll Circuit Switched Traffic and not to information services such as ISP-Bound Traffic and IP-Enabled Traffic." Level 3 BOE at 38. Level 3 is wrong. The Agreement will already contain terms specifically defining and specifying the compensation for ISP-Bound Traffic. With respect to interexchange IP-PSTN traffic, the Commission should conclude that such traffic is subject to access charges just like traditional interexchange traffic, so there is no need to distinguish between IP-enabled traffic and other interexchange traffic. And even if the Commission adopts the PAD's recommendation with respect to IP-enabled traffic, then the Agreement will not address IP-PSTN traffic, so the "differentiation" proposed by Level 3 is unnecessary.

Level 3's proposed terminology is inappropriate in any event. While the PAD adopts Level 3's primary proposal to make no decision regarding IP-PSTN traffic, Level 3 is apparently unsatisfied with that resolution. Instead, Level 3 now suggests that the Commission define the traffic subject to access charges in such a way as to affirmatively exclude IP-PSTN traffic. *See* Level 3 BOE at 38-39. That would be contrary to the PAD's proposal to make no decision

regarding IP-PSTN traffic. That would also be unlawful, even if the Commission adopts the PAD's recommendation regarding IP-PSTN traffic, because as SBC has explained, there is no FCC order or regulation that exempts interexchange IP-PSTN traffic from access charges, and the Commission cannot lawfully create a new exemption.

Level 3's suggestion that its proposed definition of "Circuit Switched Traffic" is "derived directly from FCC Orders and regulations, namely the FCC's recent [*Access Avoidance Order*]" (Level 3 BOE at 39) is nonsense. In the *Access Avoidance Order*, the FCC analyzed AT&T's IP-in-the-middle service and determined that certain characteristics of that service led the FCC to conclude it was a telecommunications service rather than an information service. Nowhere did the FCC define any such terms as "Circuit Switched Traffic" or "IP-Enabled Traffic," as Level 3 suggests. More importantly, nowhere did the FCC hold that *only* traffic that exhibits the same characteristics as AT&T's IP-in-the-middle service is a telecommunications service, or that only traffic exhibiting those characteristics is subject to access charges. Indeed, Level 3 itself has pointed out time and again that the FCC has not yet issued any order applying its current compensation rules to VoIP traffic, beyond determining that the particular traffic at issue in the *Access Avoidance Order* is subject to access charges. It is utterly inconsistent (and utterly wrong) for Level 3 to now suggest that in the *Access Avoidance Order* the FCC determined that only traffic exhibiting the particular characteristics of AT&T's services are subject to access charges.

For these reasons, the Commission should reject Level 3's Exception Four.

Level 3 Exception Five – IC-11(a).

Level 3 says it "agrees with the ALJ's determination that ISP-Bound FX/FX-like traffic is subject to reciprocal compensation, not to a bill and keep regime," but complains that the PAD "fails to discuss the merits of Level 3's arguments that the rate of $0.0007 applies to all FX

traffic that is ISP-Bound pursuant to . . . the recent FCC *Core Forbearance Order* and the *Starpower Decision*." Level 3 BOE at 41. Level 3's assertions are without merit. As SBC and Staff explain in their exceptions briefs, the Commission has previously determined that all FX traffic, including FX traffic delivered to an ISP, is subject to bill and keep, and there is no basis in law or policy to depart from that precedent so that Level 3 can enjoy an intercarrier compensation scheme different than other CLECs.

Moreover, the *Core Forbearance Order* and the *Starpower Decision* are irrelevant here. In the *Core Forbearance Order*, the FCC decided to forbear from application of the *ISP Remand Order*'s "new markets" and "growth cap" rules. But, as SBC has explained, those rules, like the remainder of the *ISP Remand Order*, applied only to traffic delivered to an ISP located in the same local exchange in which the traffic originated. Indeed, the *Core Forbearance Order* itself describes the *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). *See also ISP Remand Order*, ¶ 13 (same); *WorldCom*, 288 F.3d at 430 (same). Because the *ISP Remand Order*, and its "new markets" and "growth cap" rules, never applied to interexchange or FX traffic delivered to an ISP in the first place, the FCC's decision to forbear from the application of those rules is irrelevant to the intercarrier compensation for such traffic.[13]

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[13] Even if the *ISP Remand Order* did apply to FX traffic delivered to an ISP, the *Core Forbearance Order* would be inapplicable here, and bill-and-keep would still be appropriate. The *ISP Remand Order* held: "[B]ecause the rates set forth above are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic)." *ISP Remand Order*, ¶ 80. *See also id.* ¶ 82 (*ISP Remand Order* "does not preempt any [prior] state commission decision regarding compensation for ISP-bound traffic"). Since the Commission has consistently subjected all FX traffic, including ISP-bound FX traffic, to bill and keep and has not required the payment of compensation for such traffic, the FCC's interim compensation reductions do not apply.

The FCC's *Starpower Decision* too is irrelevant. That Order did not "make clear that the FCC makes no distinction between local and non-local ISP-Bound Traffic for purposes of compensation," as Level 3 suggests. Level 3 BOE at 41. As Level 3 itself noted (Level 3 Reply Br. at 105-06), that Order merely interpreted a particular interconnection agreement to determine whether it required compensation for certain FX traffic delivered to an ISP. The FCC explicitly 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.* Indeed, the FCC noted that its *ISP Remand Order* was not even at issue in that proceeding, because the interconnection agreements the FCC was interpreting were entered into before that Order was released. *Starpower Liability Order*, 17 FCC Rcd 6873, at ¶ 23 n.70 (rel. April 8, 2002).

For these reasons, the Commission should reject Level 3's exception. For the reasons that Staff and SBC explain in their exceptions briefs, the Commission should adhere to its precedent and hold that all FX traffic, including FX traffic delivered to an ISP, is subject to bill and keep.

Level 3 Exception Six – SS7-1.

SBC's expert witness, who has extensive pertinent experience and training (SBC Ex. 8.0 (Novack) at 1), testified unequivocally that SBC's billing systems are not able to segregate SS7 messaging associated with CLEC calls from SS7 messaging associated with interexchange calls (*id*. at 6); stated the historical reason for that (*id*. at 7); and explained how SS7 billing is accomplished when other carriers are served by third party SS7 service providers (*id*.). Level 3 countered with no evidence of its own, and also elected not to cross-examine SBC's witness or in any other way to challenge his testimony that it would be literally "impossible" (*id*. at 6) for SBC's billing systems to do what Level 3's proposal would require them to do. Thus, since

SBC's evidence that Level 3's proposal would be impossible to implement (not just that there would be "a billing problem," as Level 3 mischaracterizes it) was unrebutted, it would be reversible error for the Commission *not* to reject Level 3's proposal. In other words, Level 3 has it exactly backwards when it says, presumably with tongue in cheek, that the recommended decision is "against the manifest weight of the evidence." Level 3 BOE at 42. The PAD's resolution of SS7 Issue 1 should be sustained.

Level 3 Exception Seven – PC-1, VC-1.

The PAD correctly concluded that Level 3 should not be permitted to order collocation products from a tariff when those products are available to Level 3 through its Agreement. PAD at 216-17. Level 3's challenge to this conclusion falls flat.

First, Level 3 claims that if a collocation tariff is amended in the future, Level 3 will not be able to obtain the benefits of that amendment. *Id.* at 44. Level 3 is mistaken. When SBC makes a voluntary offering to CLECs, it does so in the context of a negotiated interconnection agreement or an Accessible Letter, not through a tariff. SBC Ex. 5.0 (Fuentes Direct) at 5-6. Moreover, in the case of voluntary offerings made through a negotiated interconnection agreement, Level 3 can opt into such a negotiated agreement pursuant to section 252(i) of the 1996 Act. With respect to Accessible Letters, SBC offers each CLEC an opportunity to amend its existing interconnection agreement in light of changes in law or new, generally available offerings. *Id.* Finally, if Level 3 wishes to take advantage of a change in law (and SBC does not publish an Accessible Letter), Level 3 can avail itself of the Intervening Law provision in GT&C Section 21 of the Agreement. Level 3 does not need to be able to order out of a tariff to ensure it has access to the most current collocation offerings. That is the conclusion the Indiana Utility Regulatory Commission ("IURC") reached when it resolved this issue in favor of SBC in the parallel arbitration there:

> . . . Level 3 should not need to order from a tariff. Level 3 has had the opportunity to request and/or arbitrate any rates, terms and conditions it felt that it needed in its Agreement. And Level 3 does not need to be able to order from a tariff in order to obtain access to collocation offerings not made available to it through its Agreement. Future offerings will be available to it through the opt-in provision of Section 252(i) of the 1996 Act, through SBC Accessible Letters, and/or the change in law provisions in section 21 of the GT&C Appendix.

Indiana Order at 162.[14]

Second, Level 3 asserts the PAD's conclusion obviates the need for tariffs. Level 3 BOE at 44-45. That assertion makes no sense. As Level 3 knows, ICAs sometimes explicitly refer to tariffs as the source for rates, terms and conditions for certain products or services. In fact, Section 2.5 of the GT&C in *this* Agreement contemplates exactly that. Here, Level 3 negotiated specific rates, terms and conditions for physical and virtual collocation, rather than including a tariff reference. Thus, for Level 3, there is no need for a collocation tariff in Illinois. However, that does not mean that some other carrier does not have an interconnection agreement that references the collocation tariff instead of setting forth its own terms and conditions.

Level 3's brief on exceptions says nothing more on this issue. Thus, Level 3 fails to address the numerous other arguments why it should not be permitted to order collocation from a tariff. As SBC explained in its initial brief, the law is clear that the Act does not contemplate the availability of tariffs to CLECs in addition to interconnection agreements. At least two federal courts of appeal, including the Seventh Circuit (whose decisions interpreting federal law bind this Commission), have held that interconnection agreements are the exclusive vehicle through which a CLEC obtains rates, terms, and conditions for interconnecting with an ILEC or obtaining

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[14] Opinion and Order, *Petition of Level 3 Communications, LLC 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 Indiana Bell Tel. Co. d/b/a SBC Indiana,* IURC Cause No. U-42663-INT-1 (adopted Dec. 22, 2004) ("*Indiana Order*").

access to an ILEC's UNEs as provided for in Section 251 of the Telecommunications Act of 1996. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003); *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497-98 (7th Cir. 2004); *Verizon North, Inc. v. Strand*, 367 F.3d 577, 584 (6th Cir. 2004); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940-41 (6th Cir. 2002). The IURC relied in part on this rule when it resolved this issue in favor of SBC Indiana: "We [] agree that the law does not contemplate the availability of collocation (or any) tariffs to CLECs; instead, interconnection agreements are the exclusive vehicle through which a CLEC obtains rates, terms, and conditions for interconnecting with an ILEC or obtaining access to an ILEC's UNEs under Section 251 of the Telecommunications Act of 1996." *Indiana Order* at 162.

Moreover, as the PAD recognizes, the FCC has warned that the availability to a CLEC of an alternate set of collocation terms and conditions, apart from its interconnection agreement, would serve as a disincentive to the traditional give-and-take of negotiations. "We share the FCC's concern that the give-and-take associated with negotiation will be subverted if carriers can improve upon their compromises, without surrendering their gains, by simply abandoning the former as subsequent opportunities arise." PAD at 216, *citing* Second Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 F.C.C. Rcd. 13,494, ¶ 11 (rel. July 13, 2004).

The principle that CLECs should not be allowed to purchase services out of a tariff when the services are covered by an interconnection agreement has been reaffirmed by this Commission several times. In its Order in Docket 01-0614 (June 11, 2002), paras. 386-390, 398, 593, the Commission cited its prior Order in Docket 99-0379, where it stated (at pp. 33-34): "Such a result would undermine the integrity of the contract and the process of which it is a part,

and would frustrate the federal scheme favoring individual negotiated agreements under the Telecommunications Act." Similarly, in Docket 99-0511, the Commission rejected a proposal that CLECs be allowed to "pick and choose" between contract and tariff provisions. There, the Commission held that "CLECs may not commit to an interconnection agreement only to ignore that contract when something better comes along." Order, Docket 99-0511 (March 29, 2002), at 30-31.

For these reasons, and those set forth in SBC's briefs, the Commission should adopt the PAD's proposed resolution of PC Issue 1 and VC Issue 1.

Level 3 Exception Eight – PC-2, VC-2.

Level 3's exception on PC Issue 2/VC Issue 2 reflects Level 3's continued mischaracterization of what this issue is about. It is not about who ultimately gets to decide whether a particular piece of equipment will be collocated, or the standards that will govern that decision. Federal law makes clear that the state commission, and the courts, will apply the FCC's regulations to decide whether a specific piece of equipment may be collocated. And the parties have agreed to contract language that sets forth the appropriate standards for necessity and safety. Nor is this dispute about who has the burden of proof and what that burden is. Federal law answers that as well.

Instead, this issue presents a straightforward question not directly addressed by federal law: When the parties disagree whether the equipment that Level 3 seeks to collocate is necessary for interconnection or access to UNEs or whether it meets minimum safety standards, should Level 3 be allowed to collocate the equipment, while the dispute is resolved? SBC (and Staff) maintain that Level 3 should not be allowed to do so.

The ALJ immediately saw through Level 3's mischaracterization of the issue:

> [W]e are mindful of SBC's admonition that this issue addresses the parties' conduct pending dispute resolution, not the substantive standards pertaining to necessity and safety.

PAD at 221. The Commission should do the same and reject Level 3's exception.

The PAD determined that the answer to the question whether equipment can be collocated pending dispute resolution depends on the nature of SBC's objection to the equipment. If the objection is that the equipment is not necessary for access to UNEs or interconnection, the ALJ decided Level 3 may collocate the equipment pending dispute resolution. PAD at 221. On the other hand, if the objection is that the equipment does not meet safety standards, it may not be collocated. Although this parsing of the issue gives SBC less than it sought, it is not unreasonable, and SBC did not take exception to it. Level 3, though, takes exception to the second part, with respect to disputes pertaining to safety. Level 3's objections are unpersuasive.

First, Level 3 cites a portion of 47 C.F.R. § 51.323(c) that addresses the burden of proof with regard to disputes about necessity. Level 3 BOE at 46. But Level 3 is not challenging the PAD as it related to disputes about necessity, and the language Level 3 cites has no bearing on the issue of disputes about safety, as the ALJ recognized:

> We find it significant that in matters of safety, as contrasted to necessity, the FCC does not require the ILEC to prove its case to this Commission. Instead, the ILEC is obliged only to precisely identify, by affidavit, its safety concern for the CLEC. The CLEC can then either accept the ILEC's sworn claim or initiate dispute resolution or complaint procedures. Thus, the FCC has shifted the burdens of action and persuasion to the CLEC when safety is at issue.

PAD at 221.

Next, Level 3 cites a portion of 47 C.F.R. § 51.323(c) that states that an ILEC may not object to collocation based on its failure to comply with certain performance standards. Again, though, the contract language at issue here has nothing to do with the substantive safety

standards that govern collocation equipment. Those standards are dealt with in agreed language in Section 6.11 of the Physical Collocation Appendix and Section 1.10.8 of the Virtual Collocation Appendix. And certainly, 47 C.F.R. § 51.323(c) does not stand for the proposition that there is no legitimate safety reason for an ILEC to deny collocation. The language that immediately follows the excerpt provided by Level 3 makes that clear:

> An incumbent LEC that denies collocation of a competitor's equipment, citing safety standards, must provide to the competitive LEC within five business days of the denial a list of all equipment that the incumbent LEC locates at the premises in question, together with an affidavit attesting that all of that equipment meets or exceeds the safety standard that the incumbent LEC contends the competitor's equipment fails to meet. . . .

47 C.F.R. § 51.323(c).

Level 3 also relies on the IURC's resolution of this issue in its favor. Level 3 BOE at 46-47. That decision suffers from the same defect as Level 3's exception. All the rationales presented by the IURC relate to disputes about necessity, not safety. While SBC does not agree with the conclusion in the PAD (or by the IURC) that allows Level 3 to collocate equipment while a dispute about its necessity is pursued, that is not the issue presented by Level 3's exception. The IURC's analysis does not even purport to address disputes about safety and therefore is of no persuasive value here.

Thus, Level 3 has presented no reason to disturb the PAD's decision that equipment that is subject to a dispute about safety may not be collocated while the parties pursue dispute resolution. Moreover, in a recent pleading in the parallel arbitration in California, Level 3 recognized the very distinction between necessity concerns and safety concerns that the ALJ made here, and all but conceded that there are legitimate reasons for not permitting collocation pending dispute resolution when safety concerns are at issue:

> Moreover, where there are no safety issues involved, but only whether the equipment is proper equipment for collocation under applicable FCC

> rules, there is no circumstance under which collocation should be delayed or denied. For there is no risk of any kind to SBC if the equipment is collocated pending any dispute resolution: if the CLEC loses the dispute resolution, it will be required to remove the already installed collocated equipment.

Level 3 Communications, LLC's Comments On Draft Arbitrator's Report, filed Jan. 11, 2005, at 18-19.

For these reasons, and those set forth in SBC's briefs, the Commission should deny Level 3's exception on PC Issue 2/VC Issue 2.

Level 3 Exception Nine – GT&C-9.

The PAD reached a middle ground on this issue – a result SBC elected not to challenge even though it fell short of what SBC proposed. Under the PAD, if Level 3 fails to pay its undisputed bill(s) or breaches the payment provisions of the Agreement in other identified ways, SBC can, upon sending Level 3 a *second* late payment notice, suspend acceptance of new service requests and completion of pending requests – but cannot, the PAD determined, cancel such requests. This result is not, as Level 3 calls it (at 49) "irresponsible." All it does is allow SBC to stop digging itself a potentially deeper hole until Level 3, which by definition is in breach of contract in the scenario at issue, cures the breach, either by paying what it owes or by disputing its obligation to pay. Level 3's claim that the PAD "provide[s] SBC with the tools of extortion" is silly. The implication is that SBC will be able to extract payments that are not owing; in reality, of course, all Level 3 has to do if it receives a bill it thinks it should not pay is dispute it. Level 3's exception on this issue should be rejected.[15]

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[15] The PAD's resolution of GT&C Issue 7 was based in part on its resolution of GT&C Issue 9. *See* PAD at 20. If the Commission were to modify the PAD resolution of GT&C-9, therefore, it would need to consider the implications for GT&C-7, to which SBC has taken exception in pertinent part.

Level 3 Exception Ten – GT&C-10(a)-(c).

SBC did not find the PAD unclear on GT&C Issues 10(a)-(c), but has no objection to such additional clarification as the Commission may see fit to provide.

Level 3 Exception Eleven – GT&C-11.

As SBC explained in its exception on this issue, Level 3 should not be permitted to assign its interest in the Agreement to an affiliate that already has an interconnection agreement with SBC Illinois, because that affiliate must honor its existing agreement with SBC Illinois for the duration of its term. Level 3's attempt to avoid that conclusion is unavailing. Level 3 reasons:

> Section 251(c) imposes a duty on all ILECs, including SBC, to "negotiate in good faith" . . . . In no manner does Section 252(c) impose any sort of mandate that a carrier with an existing amendment [sic; should be agreement] is forbidden from either negotiating a new agreement or assigning an existing agreement . . . . In fact, taken to its logical end, SBC's argument would preclude carriers from even negotiating amendments to an existing agreement, as SBC could merely respond to such a request by asserting that the requesting carrier "must abide by the terms of its existing agreement."

Level 3 BOE at 50-51. That is pure sophistry. In reality, of course, if a CLEC asks SBC to negotiate an amendment to an existing interconnection agreement, SBC absolutely does have the right to decline, and to insist that the CLEC abide by the existing agreement for the remainder of its term.[16] An interconnection agreement, including its term, is "binding" (*see* 47 U.S.C. § 252(a)), and if Level 3 believes the good faith negotiation requirement of section 251(c) means SBC is obliged to negotiate a new interconnection agreement any time a CLEC – including a CLEC with an existing agreement that it wants to replace before it terminates – asks for one,

[16] To be sure, there is an exception for requests pursuant to Intervening Law provisions to negotiate amendments in light of changes in law, but that exception proves the rule. The reason we have Intervening Law provisions is that if we did not, carriers would not be able to demand negotiation of an amendment even in the event of a change of law.

Level 3 is mistaken. This does not mean that "a carrier with an existing [agreement] is forbidden from either negotiating a new agreement or assigning an existing agreement," as Level 3 puts it. What it does mean is that a carrier with an existing agreement cannot negotiate a replacement agreement before the existing term expires unless the other party to the contract agrees, and, similarly, that a carrier with an existing agreement cannot take a replacement agreement by assignment before the term of its existing agreement expires unless the other party agrees. And that, in turn, is why Level 3 should be prohibited from assigning this ICA to an affiliate that already has an interconnection agreement with SBC Illinois.

Level 3 Exception Twelve – DEF-2, IC-18(a), IC-19(a).

On Definition Issue 2, Level 3 feigns wide-eyed surprise at the PAD's rejection of more (Level 3's proposed "Call Records") in favor of less ("CPN"). There is nothing surprising about the PAD's resolution of the issue, however, because, among other reasons, Level 3 never before hinted that "Call Records" encompasses CPN. As a matter of fact, there is nothing in Level 3's proposed contract language that remotely suggests that Call Records does encompass CPN, or that if Level 3's language were approved it would provide CPN whenever it is technically feasible to do so. Quite the contrary, Level 3 pushed its newly minted term "Call Records" on the theory that it would "allow for more flexibility for the parties to agree to new or different technologies in recording." Level 3 Br. at 175. The ALJ appropriately rejected that theory for the reasons set forth in the PAD (at p. 32), and Level 3's new contention that it really means to be offering something more rather than something different must be rejected, because Level 3's proposed contract language does not match its revisionist approach to the issue.

As for Level 3's exception on IC Issues 18(a) and 19(a), there is simply no need for the Agreement to "grant[] the Parties the ability to mutually agree to new or different formats in the

future" (Level 3 BOE at 52), because the parties already have that ability, just as they have the ability to mutually agree to virtually anything.

Level 3 Exception Thirteen – DEF-19.

It is not clear exactly what Level 3 wants, particularly because Level 3 provided no substitute language for this exception, as 83 Ill. Adm. Code 200.830 (b) requires. In part, Level 3 seeks clarification of the PAD's resolution of this issue. No clarification is necessary; the PAD plainly rejects Level 3's proposed definition of "Switched Access Service" as it appears on the Definitions DPL and approves SBC's definition. Also in part, Level 3 appears to be lodging an objection to that outcome, though only half-heartedly, since Level 3 does not say where the PAD goes wrong – only that Level 3 should win for the reasons set forth in its briefs. Level 3 is entitled to no relief, both because it did not comply with Rule 200.830(b), and because there is nothing wrong with the PAD's resolution of this issue.

Level 3 Exception Fourteen – ITR-5, ITR-8, IC-11(e).

SBC does not respond to Level 3 Exception Fourteen.

Level 3 Exception Fifteen – IC-4(b)

Level 3 objects to the PAD's approval of SBC's proposed IC Section 16.2, which provides procedures to be used if a third party inappropriately delivers interexchange traffic over local interconnection trunk groups. Level 3 asserts that SBC's language is inappropriate because it assertedly "would preclude certain customers from completing their switched access calls through no fault of their own," while "SBC and Level 3 have an absolute obligation under the terms of Section 251 to exchange **all** traffic, either switched access or local." Level 3 BOE at 54-55. That is not so.

While SBC does not agree with Level 3's interpretation of Section 251, the Commission need not reach that issue. The point here is that SBC's language does not allow SBC simply to

block traffic that a carrier is improperly routing, as Level 3 suggests. Rather, by its plain terms, the language the PAD approves only allows a party to provide written notice of an objection to improperly delivered traffic, after which the parties will work cooperatively to correct the problem. The language also provides that if the parties are unable to solve the problem within 60 days, then "the Parties agree to jointly file a complaint or any other appropriate action with the applicable Commission to seek any necessary permission to remove the traffic from such interconnection trunks up to and including the right to block such traffic." Thus, the language the PAD approves would allow a party to block improperly delivered traffic only if the Commission first gives its permission.

Moreover, Level 3's suggestion that it would never be permissible for the Commission to approve such blocking is without merit. The 1996 Act does not create the kind of "absolute obligation" that Level 3 suggests. Level 3 BOE at 54. Just as an ILEC has no "absolute obligation" to provide interconnection or UNEs in extreme cases where a CLEC, *e.g.*, uses them improperly or unlawfully, an ILEC has no "absolute obligation" to exchange all traffic even where a carrier, for instance, knowingly and consistently misroutes interexchange traffic over local interconnection trunk groups in an attempt to evade lawful access charges. In any event, under the language properly adopted by the PAD, the decision as to whether it is appropriate to block traffic will be left to the Commission, to make on a case-by-case basis and upon the particular facts of a situation.

Level 3 Exception Sixteen – IC-7(b).

Level 3 excepts to the PAD's conclusion "that Section 3.7 should provide that intercarrier compensation will commence once SBC receives 9-1-1 confirmation" (PAD at 138), on the theory "that the FCC's *Vonage* decision found that VoIP providers do not have to comply with 911 requirements." Level 3 BOE at 55. While the *Vonage Order* preempted Minnesota's 911

regulation of VoIP services, that is irrelevant here if the Commission adopts the PAD's recommendation regarding IP-PSTN traffic. The PAD recommends that the Commission conclude that the Agreement, including its intercarrier compensation provisions, will not address IP-enabled services. If the Commission adopts that recommendation, then Section 3.7, which is part of the intercarrier compensation appendix, will not apply to IP-enabled services, rendering Level 3's requested clarification unnecessary.

To the extent the Commission makes the clarification requested by Level 3, the Commission should also make clear that clarification applies only to IP-enabled services, and that for other traffic, intercarrier compensation will not commence until SBC receives 911 confirmation.

Level 3 Exception Seventeen – IC-10(c).

The PAD adopts SBC's proposed bifurcated reciprocal compensation rate structure, which applies only in the event that Level 3 does not choose to mirror the rates for ISP-Bound Traffic and reciprocal compensation traffic pursuant to the *ISP Remand Order*'s mirroring rule. PAD at 149. Level 3 asserts SBC's language should not be included in the Agreement.

Level 3 does not allege that anything in the SBC language at issue is improper or contrary to federal or state law. Nor does Level 3 lodge any objection to the substance of SBC's proposed language. Rather, Level 3 merely asserts that "Level 3 will mirror the rates" and thus "SBC's proposed bifurcated rate structure is not relevant or material." Level 3 BOE at 56-57. That exception is unfair and inappropriate. From the beginning of this arbitration, Level 3 has refused to declare whether or not it chooses to take advantage of the mirroring option. Rather, Level 3's primary position was that the parties should simply ignore the *ISP Remand Order* and repeat their preexisting intercarrier compensation terms. Thus, SBC appropriately proposed language to govern in the event Level 3 did not choose the mirroring option. While Level 3 now indicates

that it wishes to mirror the ISP-Bound Traffic and reciprocal compensation rates, it is too late in the day for Level 3 to object that SBC's language is "superfluous." Level 3's own obstinacy made SBC's language necessary.

Further, SBC's language should appear in the Agreement for the sake of completeness. If another CLEC wishes to adopt the Agreement, and if SBC's proposed language is included, then that adopting CLEC will still have a choice regarding whether or not it wishes to mirror the ISP-Bound Traffic and reciprocal compensation rates. Under Level 3's proposal to omit the SBC language at issue, on the other hand, that choice would be foreclosed to any CLEC that might wish to adopt the Agreement.

For these reasons, the Commission should adhere to the PAD's recommendation regarding SBC Sections 5.2 through 5.5, and reject Level 3's exception.

Level 3 Exception Eighteen – IC-11(c), IC-19(b).

On IC Issue 19, SBC argued that "Meet Point Billing is a method for sharing access revenues. Plainly, it does not and cannot apply where there are no access revenues to share (that is, where there is no third-party toll carrier in the middle of the call). . . . SBC's proposed language properly limits Meet Point Billing to 'Switched Access' traffic, where the parties share access revenues and where Meet Point Billing is applicable." PAD at 177 (summarizing SBC's position). The PAD resolved IC Issues 19(b) and (c) in favor of SBC, stating (in harmony with SBC's position), "Meet Point Billing is a mechanism by which LECs share access revenues received from third-party carriers for call origination and termination. IntraLATA, 'LEC-to-LEC' traffic, involving no access charges from a third-party carrier, is not subject to Meet Point Billing. The parties' ICA should reflect these principles." *Id*. at 178.

In its resolution of IC Issue 11(c), the PAD stated, "The Commission's resolution of SBC sub-issues IC-19(b) and (c) applies to, and resolves, this sub-issue as well." *Id*. at 161. Thus, the PAD resolves IC-11(c) in favor of SBC on the same terms as IC-19(b) and (c).

SBC does not believe any further clarification is needed. If the Commission wishes to provide clarification, however, the appropriate clarification would be that the SBC-proposed language for IC-11(c), 19(b) and 19(c) is approved, and the Level 3-proposed language for those sub-issues is rejected.

Level 3 Exception Nineteen – IC-13(a).

Under IC Issue 13(a), the PAD concludes that "[i]nsofar as SBC's position correctly reflects the FCC's ISP-Bound Traffic rules, it should be adopted." Level 3 seeks "clarification" of this conclusion because, Level 3 asserts, "the PAD has already determined that SBC's language does not comport with the FCC's compensation rules" and "the statement above cannot be viewed as consistent with that finding." Level 3 BOE at 58. Level 3 misconstrues the PAD.

The PAD did not conclude that all of SBC's language implementing the *ISP Remand Order* was inconsistent with the FCC's rules. Rather, the PAD concluded only that SBC's proposed *definition* of ISP-Bound Traffic, that is, the scope of traffic that SBC proposed be made subject to the contract provisions implementing the *ISP Remand Order*, should be modified. In other words, the PAD (incorrectly) determined that "ISP-Bound Traffic" should be defined to include interexchange and FX traffic delivered to an ISP – a definition that is the subject of a different issue – and the PAD (correctly) found no fault with the remainder of SBC's language implementing the *ISP Remand Order* – the language at issue under IC Issue 13(a).

To the extent the Commission makes any clarification on this issue, it should clarify that it is adopting SBC's proposed language. Among other things, SBC's language, in accordance with the *ISP Remand Order*, makes clear that ISP-Bound Traffic and traffic subject to reciprocal

compensation under Section 251(b)(5) are different classes of traffic for intercarrier compensation purposes; provides that ISP-Bound Traffic is subject to the *ISP Remand Order*'s interim compensation rate of $0.0007; and provides that reciprocal compensation will be at the same rate under the assumption that Level 3 chooses to mirror the rates pursuant to the *ISP Remand Order*.

Level 3's proposed language, on the other hand, is not consistent with the *ISP Remand Order*. Level 3 proposed to lump ISP-Bound Traffic and "circuit switched local traffic" together, and subject both to a rate of $0.0005 (which Level 3 later raised to $0.0007). That proposal fails to reflect that the different traffic types are subject to different intercarrier compensation requirements, even if the applicable rate may in some cases be the same (*e.g.*, where Level 3 chooses to mirror the rates).

Level 3 Exception Twenty – IC-13(b)-(c).

The clarification Level 3 requests is not necessary, but also is not objectionable to SBC.

Respectfully submitted,

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Dated: January 14, 2005

CERTIFICATE OF SERVICE

I, Mark R. Ortlieb, an attorney, hereby certify that I caused a copy of the foregoing **SBC ILLINOIS' REPLY BRIEF ON EXCEPTIONS** to be served on the following parties via email on the 14th day of January, 2005.

_____
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