

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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**AT&T Communications of Illinois, Inc. )**  
**TCG Illinois and TCG Chicago )**  
 )  
 ) **03-0239**  
 )  
**Verified Petition for Arbitration of Interconnection Rates, )**  
**Terms and Conditions and Related Arrangements With )**  
**Illinois Bell Telephone Company (SBC Illinois) Pursuant )**  
**to Section 252(b) of the Telecommunications Act of 1996 )**

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**REPLY BRIEF ON EXCEPTIONS OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

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raised by a party with respect to an issue addressed by Staff should not be construed to mean that Staff concurs with or does not oppose that exception; rather, it means that Staff believes it has adequately described its position in its prior briefs or that the Proposed Order adequately addressed the underlying issue.

## **II. ARGUMENT**

### **A. General Terms and Conditions (“GTC”) Issues**

#### **1. GTC Issue 1(a)**

AT&T takes exception to the Proposed Order’s conclusions with respect to GTC Issue 1a, arguing that the Commission should reject SBC’s proposal to adopt general contract language designating February 19, 2003 as the effective date of the Agreement for change of law purposes. AT&T BOE at 2. AT&T argues that the Proposed Order wrongly assumes that the parties’ negotiated ICA is only in conformance with the law as it existed on February 19, 2003. *Id.* at 2-3. AT&T asserts that negotiations have continued throughout this proceeding, and points to the parties’ recent settlement of issues as proof thereof. *Id.* at 3. AT&T also asserts that SBC has identified only a discrete number of potential change of law events. *Id.* at 3-4. AT&T argues that these events can be best addressed through language expressly identifying them as potential change in law events; thereby removing the potential for SBC to seek amendments to the interconnection agreement based on potential change in law events that have occurred or will occur between February 20, 2003 and the date of the ICC’s Order in Docket No. 03-0239 arbitrating this agreement. *Id.* at 5-6.

The Proposed Order notes that:

Staff agrees with SBC that the February 19, 2003 date should apply. Staff contends that this is the only proposal presented that insures that no party is forced to waive its abilities and rights to incorporate any changes in law.

Proposed Order at 5. Staff continues to support this position. The Commission must ensure that the parties are not precluded from incorporating changes in law simply because the change occurred between the period beginning on February 20, 2003 and the date of the ICC's Order in Docket No. 03-0239.

The Commission cannot conclude, as AT&T would have it do, that because the carriers have continued to negotiate issues they necessarily have had the opportunity to incorporate all changes in law that have occurred following February 19, 2003. As explained by Staff, the arbitration process is, according to the 1996 Act, subject to scheduling constraints and does not specifically allow for alterations of, or additions to, the issues list submitted in the Arbitration Petition and the Petition Response. Therefore, it is conceivable that change of law events have occurred during the course of this proceeding that the parties might not have been able to feasibly incorporate into this proceeding. Staff Initial Brief ("IB") at 5. Staff also notes that AT&T neither contends nor demonstrates that the parties have incorporated any post February 19, 2003, changes in law into the ICA.

AT&T argues that the Proposed Order "would allow SBC to raise any heretofore unidentified development that occurred subsequent to February 19, 2003 as a 'change of law' and demand renegotiation of portions of the Agreement that has been approved by this Commission – even though that development could have been raised during negotiations or during this arbitration proceeding." AT&T BOE at 4-5. Ensuring that parties are not precluded from incorporating changes in law into their agreement should take precedence over ensuring that carriers are precluded from raising changes in law

that could have arguably been incorporated into an ICA. . Furthermore, concerns that SBC will frivolously attempt to renegotiate the agreement are mitigated by the fact that SBC is obligated under Section 251(c)(1) of the Act to negotiate in good faith the terms and conditions of its interconnection agreements. Finally, Staff notes that the change in law cut off date adopted by the Proposed Order is less than two (2) months prior to the date AT&T filed its petition for arbitration. While there may have been some opportunity to incorporate changes in law that occurred post February 19, 2003, that opportunity was both *de minimis* and impractical. In Staff's view, the Proposed Order correctly concluded that protection of the parties' ability to incorporate changes in law is paramount, and chose a date that is reasonable based upon the record.

## **2. GTC Issue 1(d)**

GTC Issue 1(d) centers on AT&T's request to include language in the interconnection agreement ("IA") allowing either party to petition the Commission for deferral of the renegotiation and dispute resolution process that would otherwise apply to "changes in law" if the decision, rule or law constituting the change in law is subject to review and has not yet become final and nonreviewable. The Proposed Order adopts the language proposed by SBC to resolve GTC Issue 1(d), thereby denying AT&T's request. See Proposed Order at 8. AT&T argues that the Proposed Order "and apparently Staff" appear to misunderstand AT&T's proposed language. AT&T BOE at 8-9. In its brief on exceptions, AT&T quotes several sentences from the Proposed Order and then asserts that:

contrary to the PO's description, AT&T's language does not give a party a unilateral right to refuse to negotiate an amendment to the Agreement while a claimed change in law event is subject to further judicial review.

Rather, AT&T's proposed language only gives a party the right to petition the Commission for a determination that renegotiation of an amendment should not go forward pending judicial review.

*Id.* at 9. As an initial matter, Staff notes that it had no misunderstanding regarding AT&T's position. In its Initial Brief, Staff quoted AT&T's proposed language and noted that "what is at issue per AT&T's proposed language is the ability of the parties to petition the Commission to defer renegotiation or dispute resolution for changes in law that are not final and nonreviewable." Staff IB at 10.

Although the Proposed Order may contain a slight misstatement of AT&T's proposal<sup>1</sup> (focusing on the intended result rather than the proposed process), AT&T's proposal continues to suffer from the deficiencies relied upon by the Proposed Order to reject AT&T's proposal. See Staff IB at 9-11 (Identifying deficiencies with AT&T's proposal to allow parties to petition for deferral of change in law requirements). The fact that these deficiencies could occur some of the time instead of all of the time under AT&T's proposal does not make that proposal any more appealing or less objectionable. The language proposed by SBC and adopted by the Proposed Order limits the change in law requirements to legally binding changes in law. AT&T has not presented any basis or authority for the Commission to disregard an otherwise valid and binding law, rule or decision, and the Commission should not adopt a process that contemplates such a result.

AT&T posits that its principal concern is that a party not be required to expend resources negotiating and implementing an IA amendment and any related system

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<sup>1</sup> Staff notes that the Proposed Order relies heavily on AT&T's Initial Brief in terms of summarizing AT&T's position. To the extent that the Proposed Order contains any misstatement of AT&T's proposal, it appears to have resulted from AT&T's summary of its own position.

changes while the order, decision or statute constituting the claimed change in law is still subject to judicial review. AT&T then argues that it should have a process for seeking to have change in law negotiations postponed pending further judicial review. AT&T BOE at 10. The fact of the matter is that such a process is available through a motion or petition to the reviewing court (or original decision making tribunal) for a stay of the rule, law or decision.<sup>2</sup> AT&T's proposal is merely an invitation for the Commission to substitute its judgment for that of other bodies or tribunals. Staff IB at 11. For all of the foregoing reasons, AT&T's exception should be denied.

Although AT&T's exception should be denied, Staff does agree that the Proposed Order should be modified to more accurately reflect the parties' positions. Thus, Staff proposes the following modification to the Proposed Order:

#### AT&T's Position

With regard to Issue GTC 1d, AT&T stated that once the parties have executed the ICA, they should be entitled to rely on the status of the law as reflected in the ICA until a final and nonreviewable change in applicable law has occurred. A party should not be required to negotiate whether a regulatory order or ~~of~~ court decision constitutes a change in applicable law that has a material impact on the ICA, or to negotiate a consequent amendment to the ICA, until the regulatory order or court decision becomes final and nonreviewable. Otherwise, a reversal of the order or decision at the next level of review may require yet another round of negotiations and amendments to the ICA. For the sake of certainty in operation during the term of the ICA and to conserve resources that might be squandered in negotiating and implementing provisions that may be subject to further revision as a result of reversal or modification of a prior court decision or administrative order, a party should ~~not~~ be entitled to petition the Commission to defer a party's ability to invoke the change in law provision of the ICA based on a regulatory order or court decision until that order or decision is final and non-reviewable.

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<sup>2</sup> For example, following its decision in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) the appellate court stayed its vacatur of certain FCC orders in *United States Telecom Ass'n v. FCC*, 2002 U.S. App. LEXIS 18823 (2002).

## SBC's Position

This Agreement is based on the law as it was when the parties negotiated it (and the Commission arbitrated it), and when there is a change in the law on which the Agreement was based, the party that the change favors is entitled to demand that the Agreement be amended to reflect the change. Accordingly, the parties should be permitted to invoke their change of law rights once the change of law event is “legally binding” – that is, once the judicial decision or Commission Order (for example) is in effect and is no longer subject to a possible stay. AT&T’s proposal, that a party that does not like a change of law should be allowed to delay the process of amending the Agreement until the change of law event is “final and nonreviewable”, leads to absurd results, according to SBC, because it would require the parties to continue to operate under old laws and old rules long after, sometimes years after, those laws and rules change.

## Staff's Position

AT&T’s proposal to allow the parties to petition for deferral of the change in law requirements until such change becomes final and nonreviewable is contrary to a prior Commission ruling and would effectively force SBC to give up its right to incorporate otherwise effective changes in law into the interconnection agreement. Staff also argues that the process sought by AT&T is available through a motion or petition to the reviewing court (or original decision making tribunal) for a stay of the rule, law or decision. Therefore, Staff recommends the Commission adopt SBC’s proposed language tying the change in law requirements to “legally binding” changes in law.

## Commission Analysis and Conclusion

~~The Agreement between AT&T and SBC was negotiated under the current laws at the time of the agreement.~~ The question to be answered in this issue is: when should a change of law be deemed effective for purposes of triggering the parties’ obligation to participate in the agreed upon process to modify the Agreement to reflect changes in law, applicable to this Agreement? Is it when the law, rule or decision case is originally issued by the legislative body, administrative tribunal, or court, or is it when all judicial challenges to the law, rule or decision have been exhausted FCC, Federal Court or State Commission? SBC argues that there should not be a delay in the process of amending the agreement until the change of law event is final and non-reviewable. AT&T opines that a party should have the right to petition the Commission for a determination that renegotiation of an amendment should not go forward pending judicial review. ~~there should be no negotiations concerning a change of law until the change of law event is final and non-reviewable.~~

Staff agrees with SBC on this issue. Staff concurs with the observation contained in SBC's brief that As they point out from SBC's brief, the review of many of these a rule, law or decisions would outlast the length of the Agreement decision itself. According to Staff, if AT&T's language is adopted, it would essentially allow the parties to petition the Commission to in effect impose a stay on the implementation of any new law, rule or decision. Staff observes that in Global NAPs Illinois, Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Verizon North, Inc., f/k/a GTE North Incorporated and Verizon South, Inc., f/k/a GTE South Incorporated, Docket No. 02-0253, Order On Rehearing at 24-25 (Nov. 7 2002) we accepted Verizon's argument that "the parties' agreement must recognize [a change in law] rather than try to predict the result of further proceedings or substitute [our] judgment for that of a governmental decision-maker who chose not to grant a stay." Staff notes that just because these deficiencies could occur some of the time instead of all of the time under AT&T's proposal does not make that proposal any more appealing or less objectionable.

Based on the above, we agree with SBC and Staff on this issue. Any of the appeals Appeals or challenges to laws, rules and decisions may take years to resolve and. It could outlast the terms of this ICA. We have previously declined to include a requirement that a change in law be final and non-reviewable because of the importance of recognizing changes in law and to avoid substituting our judgment for that of a governmental decision-maker who chose not to grant a stay. We agree with Staff that the fact these deficiencies could occur some of the time instead of all of the time under AT&T's proposal does not make that proposal any more appealing or less objectionable. Therefore, we adopt the language as proposed by SBC to resolve General Terms and Condition Issue No. 1(d).

### **3. GTC Issue 7**

In its BOE, SBC contends that the Proposed Order erred by addressing rate issues in the context of GTC Issue 7. According to SBC, the Proposed Order was correct in determining that AT&T should be responsible for costs incurred by SBC to make changes on AT&T's records associated with a merger, assignment, or transition agreement with another CLEC. However, SBC contends that the Proposed Order erred

inasmuch as the method by which the rate is determined is outside the scope of this arbitration.

Staff is of the opinion that it is entirely appropriate to address the method by which rates are to be set in the context of this proceeding. Section 252(c)(2) requires the Commission to resolve open issues with respect to any rates for services or network elements and impose conditions upon the parties in accordance with subsection (d) – pricing standards. Section 252(d) requires the Commission to set just and reasonable rates. Staff is proposing that the BFR process that is included in SBC’s current tariff be used to establish rates for SBC to update OCN/ACNA codes due to AT&T entering into an agreement to merge with, assign or transition to another carrier. SBC’s tariff states that a BFR applies to a telecommunication carriers written request for SBC to provide “a customized element for features, capabilities, functionalities or unbundled network elements not currently otherwise provided under this tariff.” Updating OCN/ACNA codes due to AT&T entering into an agreement to merge with, assign or transition to another carrier falls within the aforementioned provision. The BFR process would then require SBC to develop an appropriate price for updating the OCN/ACNA codes, and to notify AT&T and Staff of that price or rate it is offering a CLEC. See Order, Docket No. 01-0614, ¶458. Requiring SBC to provide to Staff the rates it quotes for updating AT&T’s OCN/ACNA codes enables the Commission to review the rates that are quoted to ensure that they are just and reasonable. As such, requiring SBC to provide the BFR process to AT&T in this situation is the method by which the Commission can ensure that rates for services are established pursuant to §252(c)(2).

In addition, the language SBC proposes for section 1.47.1 implicitly includes the rate methodology issue that SBC claims is outside the scope of the question. SBC's proposed language states that the "CLEC is responsible for costs of implementing any changes to its OCN/ACNA." Verified Petition for Arbitration, Master List of Issues, GTC 7. By presenting the Commission with the issue of who is responsible for certain costs, the parties have placed before the Commission the authority to address the method by which SBC recovers those costs from AT&T (i.e. a rate issue).. Under the Telecommunications Act of 1996, the Commission has an obligation to ensure that rates are just and reasonable. 47 U.S.C. § 252(d). It is difficult to consider whether one party, or the other, shall be responsible for costs without considering the method by which the rate is determined. As discussed in Staff witness Hanson's verified statement (at 5), under SBC's proposed language, it is possible for AT&T to be charged a rate that is not just and reasonable. See *also*, Staff RB at 8-9. The Commission cannot allow this to occur and has the authority to determine procedures to assure that it does not occur.

SBC argues that using the BFR methodology is outside the scope of the question presented in the verified petition. Subsumed within GTC 7, however, is the fact that the rate SBC charges AT&T must be just and reasonable. SBC acknowledged as much by stating that it is not authorized to overcharge AT&T. See SBC IB at 35. Although the exact circumstance in which SBC must pass on a cost to AT&T has not occurred, the language in section 1.47.1 anticipates that AT&T may dispute the rate it is charged by SBC. Since section 1.47.1 anticipates that AT&T may dispute a rate, the process by which this Commission meets its obligation to determine the justness and reasonableness of that rate is therefore inherent in the issue. SBC described the

process under its proposal in its initial brief, stating that AT&T will only be billed for reasonable and appropriate costs, and if AT&T believes the bill is too high it can follow the dispute resolution process. SBC IB at 36; BOE at 6. For the reasons set forth in Staff's Initial Brief (at 30-31), and Reply Brief (at 8-9) Staff does not find the dispute resolution process to be satisfactory nor in the public interest. As a counterproposal to the dispute resolution process, Staff proposed the BFR process. The BFR process provides a process by which just and reasonable rates can be set. For the reasons set forth above and in its reply brief, requiring SBC to use the BFR process to determine the costs that SBC incurs is therefore, not outside the scope of GTC 7, and is superior to the dispute resolution process that AT&T would have to follow under SBC's proposed language. See Staff RB at 8-9.

Accordingly, the Proposed Order correctly determined that the BFR process should be used by SBC in determining the rates it is to charge AT&T for changing its records as a result of a merger, assignment or transition.

## **B. Interconnection Issues**

### **1. Interconnection Issue 6, 7, 8**

The Proposed Order recognizes that previous Commission decisions regarding interconnection arrangements did not address the issue of whether CLECs with more than one POI are free to direct traffic past a nearby switch to a switch located further away. Proposed Order at 9. In its Brief On Exceptions Staff offered language that would require SBC to transport local traffic to the nearest AT&T switch, subject to two caveats: (1) the switch must be used by AT&T to provide local exchange service and (2)

it must be technically feasible for AT&T to accept the local exchange traffic at the switch. SBC proposed similar language that omitted the caveats.

In light of SBC's proposal, Staff recommends that the Commission accept a combination of the language proposed by Staff and SBC. The two caveats identified above are necessary to ensure that SBC does not "dump" traffic at a non-local AT&T switch or a switch that can't feasibly, as a result of technical considerations, accept such traffic. However, Staff believes that SBC's languages clarifies better that SBC will continue to transport traffic to switches located further away and the appropriate financial terms for such arrangements.

Staff recommends the following language, which it understands is acceptable to SBC:

Notwithstanding anything to the contrary in this Article 4, when SBC Illinois is the Originating Party it shall not be required to transport originating traffic to an AT&T POI that is further away than an eligible AT&T switch. An AT&T switch shall be deemed an eligible switch if it is used for the provision of local exchange or FX service and it is not technically infeasible to receive SBC's traffic at the AT&T switch. If AT&T asserts that a particular switch is not eligible to receive traffic originated by SBC then AT&T must demonstrate that the switch is not used by AT&T for provision of local exchange or FX service or cannot as a result of technological infeasibility receive SBC's traffic. If AT&T requests that SBC Illinois transport traffic beyond the eligible AT&T switch that is the switch closest to the exchange in which the call originated, AT&T shall pay for the transport beyond its closest switch location at the TELRIC-based rates for unbundled dedicated transport.

## C. UNE Issues

### 1. UNE Issue 10

Although agreeing with part of the Proposed Order's conclusions with respect to UNE Issue 10, SBC takes exception to the following modifications adopted by the Proposed Order with respect to Section 9.3.3.9.

9.3.3.9 Without affecting the other provisions hereof, SBC's UNE combining obligations referenced in this Section 9.3 apply under federal law only only (sic) in situations where each of the following is met:

See SBC BOE at 17-19; Proposed Order at 60-61. First, SBC states that it objects to deletion of the word "only" from Section 9.3.3.9, "because the whole purpose of the provision is to say that SBC Illinois' UNE combining obligations apply only in certain circumstances." *Id.* at 18. SBC's argument misses the mark. Although not explicitly explained in the Proposed Order, it is obvious that the Proposed Order's deletion of the word "only" and addition of the words "under federal law" was intended to make clear that the limitations adopted by the Proposed Order<sup>3</sup> do not apply to requests for combinations under Illinois law. Indeed, SBC seems to recognize this in its exceptions to the "under federal law" language:

. . . the ALJs may have intended to modify section 9.3.3.9 in such a way as to make the *Verizon* limitations apply only when AT&T asks SBC Illinois to provide UNE combinations under federal law, and not when AT&T asks SBC Illinois to provide UNE combinations under Illinois law. If that is the intent, the phrase should still be excluded, because the *Verizon* limitations should apply to combinations that SBC Illinois provides under Illinois law as well as to combinations that SBC provides under federal law.

SBC BOE at 18. Thus, deletion of the word "only" is appropriate given the result reached by the Proposed Order. If anything, SBC's argument provides support for

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<sup>3</sup> Staff opposed and took exception to inclusion of these limitations. See Staff IB at 55-56; Staff BOE at 8- (continued...)

rejecting the limitations adopted by the Proposed Order. See Staff IB at 55-56, 63; Staff BOE at 8-15.

SBC's second argument is that the limitations discussed in *Verizon* must be applied to the combination obligations imposed under Section 13-801(d)(3) of the Illinois Public Utilities Act, 220 ILCS 5/13-801(d)(3), so as to avoid being inconsistent with the 1996 Act. SBC BOE at 18-19. SBC's argument is based on faulty reasoning and misinterprets Section 13-801. Just because the 1996 Act does not impose a certain obligation does not mean that it prohibits States from imposing such an obligation. See *Illinois Bell Tel. Co. v. Worldcom Tech., Inc.*, 179 F.3d 566, 573 (7th Cir. 1999) (noting in the context of reciprocal compensation for calls to Internet Service Providers that simply because "the Act does not *require*" something does not mean "that it *prohibits* it") (italics in original). SBC's contention that its combination obligations under State law can be no broader than its combination obligations under federal law must be rejected here as it relies on the same faulty reasoning rejected by the 7<sup>th</sup> Circuit in *Worldcom*.

SBC also cites to Section 13-801(a) to support its argument, and asserts that the "combining requirement in PUA section 13-801(d)(3) must be interpreted and applied in a manner that is consistent with federal law." SBC BOE at 18. The language of Section 13-801(a) undermines rather than supports SBC's argument. Section 13-801(a) states that "[t]his Section provides **additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996**, and not preempted by orders of the Federal Communications Commission." 220 ILCS

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5/13/801(a) (emphasis added). The express statutory acknowledgement that Section 13-801 provides “**additional State requirements**” is directly at odds with SBC’s assertion that the combining requirements of Section 13-801(d)(3) must be limited to the combining requirements contained in the 1996 Act. Moreover, the phrase “not inconsistent with” the 1996 Act is a legislative finding that the “additional obligations” are “not inconsistent” with federal law, rather than some sort of statutory interpretation instruction as contemplated by SBC.

Moreover, SBC’s argument is inconsistent with the well established rule of statutory construction that prohibits statutes from being interpreted in a manner that renders words or phrases meaningless. See *e.g.*, *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 422 (1997), *citing Kraft v. Edgar*, 138 Ill. 2d 178, 189 (1990) (“A statute should be construed so that no word or phrase is rendered superfluous or meaningless.”). Here, SBC would read the word “additional” out of Section 13-801(a), clearly an improper result. To the extent that SBC desires to attack the propriety of the legislative mandates contained in Section 13-801, Commission proceedings are an inappropriate forum for same. *Illinois Bell Telephone Company: Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act*, ICC Docket No. 01-0614, Order at ¶¶ 31-34 (July 11, 2002) (Holding Commission was improper forum to seek overturn or preemption of Section 13-801 in response to similar argument that Section 13-801 imposed obligations inconsistent with federal law.).

Illinois courts have long held that the “primary rule of statutory construction is to give effect to legislative intent by first looking at the plain meaning of the language.” See *e.g.*, *Davis v. Toshiba*, 186 Ill. 2d 181, 184-85 (1999). Where the statutory

language is clear and unambiguous, moreover, “a court must give it effect as written, without reading into it exceptions, limitations or conditions that the legislature did not express.” *Id.* (Internal punctuation and citations omitted.). Section 13-801(d)(3) clearly sets forth SBC’s State law combining obligations:

(3) Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700.

220 ILCS 5/13-801(d)(3). SBC has not provided any reasons, persuasive or otherwise, to read into Section 13-801(d)(3) the exceptions and limitations it seeks to impose.

## **2. UNE Issue 13**

AT&T contends that the Proposed Order’s definition of preexisting combinations goes beyond SBC’s tariffed definitions of preexisting combinations. According to AT&T, this will impede its ability to offer line splitting over UNE-P. AT&T BOE at 37-39. However, AT&T admits that line splitting will require inserting a line splitter to separate the voice path from the data path, and that this insertion will require physical work. If inserting a line splitter requires physical work, then SBC should be compensated for this physical work and, consequently, it is inappropriate to include line splitting under the “pre existing category” as proposed by AT&T. However, Staff acknowledges that SBC’s charges for new combinations were not specifically developed for line splitting situations and, as a result, it is possible for AT&T to pay line connection charges in circumstances when no “line connections” are performed by SBC. Thus, although Staff disagrees with AT&T’s exception for UNE Issue 13 and its proposed resolution, AT&T has raised a

concern that should not be ignored in connection with the fact that SBC does not appear to have a charge appropriate for the line splitting only scenario.

Consequently, Staff proposes that the Proposed Order be modified to direct SBC to develop a special set of charges for line splitting within six months of this agreement (i.e., develop charges for inserting a line splitter). Staff further recommends that the Proposed Order be modified to state that until the special splitter connection charges are developed and approved by the Commission, SBC will be allowed to charge rates consistent with “new combinations”. However, after the appropriate line splitting connection charges are developed, there will be a “true up” with AT&T. Under the “true-up” SBC will pay AT&T the difference between what it charged AT&T for line splitting under the “new combination” set of charges, and what it would have charged AT&T if the newly developed and approved line splitting connection charges had been in effect. Alternatively, if the newly developed and approved line splitting connection charges exceed what AT&T was charged under the “new combination” set of charges, then AT&T shall pay SBC the difference. The Proposed Order should also be modified to indicate that if non-recurring connection charges for new line splitting combinations are not developed and approved within 6 months, then SBC shall cease charging AT&T non-recurring connection charges for new line splitting combinations. The true-up provision will, however, continue to apply until such time as SBC develops and the Commission approves line splitting connection charges.

In accordance with the modifications proposed above, the Proposed Order should also direct that Section 9.3.3.1.3 be added to the ICA as follows:

9.3.3.1.3 SBC will develop a special set of splitter connection charges for line splitting to be submitted to the Commission for approval within six

months of the effective date of this agreement. Until the special splitter connection charges are developed and approved by the Commission, SBC will charge AT&T the charges applicable for “new combinations”. After the appropriate splitter connection charges are approved by the Commission, there will be a “true up” with AT&T. Under the “true-up” SBC will pay AT&T the difference between what it charged AT&T for line splitting under the “new combination” set of charges, and what it would have charged AT&T if the newly developed and approved line splitting connection charges had been in effect. Alternatively, if the newly developed and approved line splitting connection charges exceed what AT&T was charged under the “new combination” set of charges, then AT&T shall pay SBC the difference. If non-recurring connection charges for new line splitting combinations are not developed and submitted to the Commission for approval within 6 months, then SBC shall cease charging AT&T non-recurring connection charges for new line splitting combinations. The true-up provision will, however, continue to apply until such time as SBC develops and the Commission approves line splitting connection charges

### 3. UNE Issue 15

Staff believes that it will be helpful in responding to the parties’ exceptions on UNE Issue 15 to first review the conclusions reached by the Proposed Order for UNE Issue 15.

The Proposed Order adopts (Proposed Order at 74) the following disputed language (bold and underlined) proposed by AT&T:

9.3.1.3.6 Operator services will, at AT&T’s option, be provided to AT&T in conjunction with the UNE-P as described in Schedule 9.2.6 and Schedule 9.2.9/Article 22. **Collocation by AT&T shall not be required.**

9.3.1.3.7 Directory assistance will, at AT&T’s option, be provided to AT&T in conjunction with the UNE-P as described in Schedule 9.2.6 and Schedule 9.2.9/Article 22. **Collocation by AT&T shall not be required.**

The Proposed Order **rejects** as too broad (*Id.*) the following disputed language (bold and underlined) proposed by AT&T for Section 9.3.2.2:

**9.3.2.2 UNE-P not to require collocation in any SBC-AMERITECH facility for any purpose.**

The Proposed Order also **rejects** the following disputed language (bold and underlined) proposed by SBC for Section 9.3.2.2 because it “could be seen as requiring AT&T to combine for itself on UNE-P” (*Id.*):

**9.3.2.2 SBC will not require a CLEC to collocate in order to receive UNE-P, however, if AT&T is collocated, it must combine the elements for itself and SBC is not required to combine for AT&T.**

The Proposed Order **accepts** the following disputed language (bold and underlined) proposed by SBC for 9.3.3.9.5.3 as “consistent with the Verizon decision” (*Id.*):

**9.3.3.9.5.3 For purposes of Section 9.3.3.9.5 and without limiting other instances in which AT&T may be able to make a combination itself, AT&T is deemed able to make a combination itself when the UNE(s) sought to be combined are available to AT&T, including without limitation: at an SBC-AMERITECH premises where AT&T is physically collocated or has an on-site adjacent collocation arrangement.**

Finally, the Proposed Order **rejects** the following disputed language (bold and underlined) proposed by SBC because it is inconsistent with the conclusion of UNE Issue 14, the issue should be addressed by the change in law provision, and it would be premature to address the issue at this time (*Id.*):

**9.3.3.10 Subject only to the special dispute resolution procedure set forth in Section 9.3.3.10.1 below, Section 9.3.3.9.5 shall only begin to apply thirty (30) days after notice by SBC-13STATE to CLEC. Thereafter, SBC-13STATE may invoke Section 9.3.3.9.5 with respect to any request for a combination involving UNEs.**

**9.3.3.10.1 In the event that SBC-AMERITECH issues a thirty-day notice as described in Section 9.3.3.10 and AT&T wishes to dispute SBC-AMERITECH’s position that the standards set forth in Section 9.3.3.9 justify its refusal to combine and/or that the situation(s) in which SBC-AMERITECH is invoking Section 9.3.3.9 meet(s) the standards set forth in Section 9.3.3.9 (as described in such notice), AT&T may institute dispute resolution under this Section 9.3.3.10. Notwithstanding any other dispute resolution procedures that may**

**be set forth in this Agreement, the following dispute resolution process (and no other) shall govern any dispute under this Section:**

**9.3.3.10.1.1 AT&T must notify SBC-AMERITECH in writing of its intent to dispute the Section 9.3.3.10 notice within ten (10) days of the date of SBC-AMERITECH's thirty-day notice;**

**9.3.3.10.1.2 No later than five (5) days after AT&T sends the written notice of its intent to dispute, AT&T must institute a formal dispute resolution proceeding with the state Commission. If AT&T fails to institute such proceeding within that period, SBC-AMERITECH, at its sole option, may institute such a formal dispute resolution proceeding before the day upon which the thirty-day notice under Section 9.3.3.10 would otherwise become effective. In any formal dispute resolution proceeding under this Section 9.3.3.10, the filing party shall also request an expedited proceeding, if available, and either party may request expedited relief, if available. If neither AT&T nor SBC AMERITECH institutes a formal dispute resolution proceeding under this Section 9.3.3.10, SBC-AMERITECH's thirty-day notice shall become effective under its original terms.**

**9.3.3.10.1.3 If AT&T pursues such formal dispute resolution proceeding under this Section 9.3.3.10, SBC-AMERITECH's thirty-day notice shall be effective ten (10) days after the Commission issues an order resolving such dispute, unless ordered otherwise by the Commission or as the Parties may mutually agree.**

**9.3.3.10.1.4 The dispute resolution procedure set forth in this Section 9.3.3.10 shall govern without regard to any other dispute resolution procedures set forth in this Agreement.**

**9.3.3.10.1.5 Any formal dispute resolution proceeding instituted by AT&T with respect to a particular SBC-AMERITECH notice shall be requested to be consolidated with all other proceedings instituted before the Commission with respect to that same notice. AT&T hereby consents to such consolidation, shall request it with its initial filing if AT&T is the party filing for a formal dispute resolution proceeding and shall not object or otherwise oppose such consolidation.**

**9.3.3.10.1.6 If AT&T fails to institute a formal dispute resolution in accordance with this Section 9.3.3.10, AT&T agrees and acknowledges that it shall be barred and otherwise foreclosed**

**from filing such a proceeding, that it shall not participate in any proceeding instituted with respect to such notice and that it shall not otherwise dispute such SBC-AMERITECH notice. This Section 9.3.3.10.1.6 shall not affect AT&T's ability to raise combining issues with respect to a successor interconnection agreement subsequently negotiated between AT&T and SBC-AMERITECH.**

The main point of contention with respect to UNE Issue 15 is whether AT&T is required to combine for itself when it is physically collocated. The parties disagree on whether the Supreme Court's discussion in *Verizon* of the inability of a CLEC to combine for itself as a limiting condition to an ILEC's duty to combine should be interpreted to automatically cut off an ILEC's duty to combine UNEs when a CLEC is collocated, and whether language to that effect should be included in the ICA. SBC and AT&T both argue that the Proposed Order is inconsistent because it accepts language for Section 9.3.3.9.5.3 deeming AT&T to be "able to make a combination itself" when it is collocated, but rejects language for Section 9.3.2.2 requiring AT&T to "combine the [UNE-P] elements for itself" when it is collocated. See AT&T BOE at 44-46; SBC BOE at 25-27.

Staff agrees with both AT&T and SBC that the ICA language adopted by the Proposed Order should be internally consistent. However, Staff disagrees with SBC's proposal to obtain consistency by modifying the Proposed Order to adopt SBC's proposed language for Section 9.3.3.2. The problem with SBC's proposal is that it ignores the fact that the Proposed Order correctly found the reasoning underlying SBC's proposed language to be faulty as a matter of substance and improper in its timing due to uncertainty over the meaning of certain language in the *Verizon* opinion.

In Staff's opinion, the Proposed Order should be modified to delete Sections 9.3.3.9.5, 9.3.3.9.5.1, 9.3.3.9.5.2 and 9.3.3.9.5.3 completely from the proposed ICA. See Staff BOE at 8-17. As explained in Staff's Brief On Exceptions, Sections 9.3.3.9.5, 9.3.3.9.5.1, 9.3.3.9.5.2 and 9.3.3.9.5.3 are based on an improper reading of the Supreme Court's Verizon decision. See Staff BOE at 10-17. Further, the Proposed Order, as also explained in Staff's Brief on Exceptions, affirmatively endorses maintenance of the status quo – which means SBC would do the combining even when AT&T is collocated – pending further clarification of the Supreme Court's statements in *Verizon*. See Staff BOE at 14-15. . Thus, the adoption of Sections 9.3.3.9.5, 9.3.3.9.5.1, 9.3.3.9.5.2 and 9.3.3.9.5.3 not only causes an internal inconsistency, but also conflicts with proper substantive findings contained in the Proposed Order. That is, notwithstanding indications to the contrary in the Proposed Order, the wording in Sections 9.3.3.9.5, 9.3.3.9.5.1, 9.3.3.9.5.2 and 9.3.3.9.5.3 could be interpreted to mean that AT&T should do the combining when it is collocated.

Staff believes that the ICA should be unambiguous with respect to which party, AT&T or SBC, is required to do the combining when AT&T is collocated. Apparently inconsistent language will cause disputes to arise at some future point in time. The Commission can avoid this unnecessary litigation by deciding the issue now, and the best way that this can be done is eliminating sections 9.3.3.9.5, 9.3.3.9.5.1, 9.3.3.9.5.2 and 9.3.3.9.5.3 completely from the proposed ICA. Eliminating these sections from the ICA will affirmatively endorse maintenance of the status quo – which means SBC would do the combining even when AT&T is collocated – pending further clarification of the Supreme Court's statements in *Verizon*.

AT&T argues that SBC's proposed Article 9, Section 9.3.3.9.5.3 is not properly attributed to the *Verizon* decision. AT&T BOE at 45. Staff concurs. First, as AT&T correctly notes, the *Verizon* decision makes no mention of the relationship between the ILECs obligation to combine UNEs and CLEC collocation. See AT&T BOE at 45. Second, the collocation standard, explicitly defined in Section 9.3.3.9.5.3, (i) ignores the uncertainty that the Proposed Order acknowledges to exist regarding the meaning and application of the statements contained in the *Verizon* decision, (ii) is based upon SBC's unsupported assertions that AT&T is able to combine for itself if AT&T is collocated, and (iii) reaches a result inconsistent with State law.

SBC argues that it has presented undisputed evidence that "as a factual matter, AT&T is able to combine the UNE for itself in situations where it is collocated or has an adjacent collocations arrangement." SBC IB at 126. SBC argues that this necessarily indicates that AT&T should be deemed to be able to combine UNEs for itself." SBC IB at 126. Staff disagrees. First, SBC argues:

"...the suggestion that the Commission interpret what the Supreme Court meant when it ruled that an ILEC's duty to combine elements only arises when the entrant is unable to do the job itself is bad advice."

SBC IB at 109. Thus, SBC argues that no party should define when an entrant is unable to combine for itself, but then submits its own interpretation of when an entrant is unable to combine for itself and argues that the Commission must accept its interpretation. The Commission should reject this self contradictory argument. Staff concurs with SBC that the Commission should not determine when an entrant is unable to combine for itself in this proceeding. There is simply insufficient evidence in this proceeding to reasonably evaluate all the myriad factors that would need to be considered to determine when an entrant is unable to combine for itself.

The meager evidence SBC has presented and asserts is undisputed does not prove that collocated CLECs can combine for themselves. For example, SBC states:

...in situations where AT&T is collocated, AT&T is able to run cross-connects to combine UNEs in the same manner that SBC Illinois would be required to if it were to combine those UNEs for AT&T.

SBC IB at 125. First, this statement implies that AT&T's technicians have the same level of knowledge of SBC's equipment as SBC's technicians, something that SBC arguably cannot know and definitely has not shown to be true. Second, as SBC notes in the very next paragraph, AT&T would need to

...order the necessary cross-connects that extend the UNEs to its collocation arrangement. These cross connects would be placed by SBC Illinois to the facilities designated by AT&T on their service orders.

SBC IB at 124. This statement reveals that, in fact, collocation alone is not sufficient to enable AT&T to combine UNEs. AT&T must rely on SBC to establish the proper conditions so that AT&T can finish the combination. However, Section 9.3.3.9.5.3 does not condition the determination of AT&T's ability to combine for itself on the specific tasks SBC admits it must complete in order for AT&T to be able to combine for itself. Thus, SBC's evidence does not merely fail to prove that collocation alone is sufficient to enable AT&T to combine for itself, rather SBC's evidence proves that collocation alone is insufficient to enable AT&T to combine for itself. Similarly, SBC's evidence fails to access the significance of the fact that AT&T is denied access to SBC's main distribution frame, and whether such denial should be deemed to prevent AT&T from combining for itself even if it is collocated. See Staff BOE at 16-17.

Apart from these facts, even if federal law does not require SBC to combine UNEs for AT&T when it is collocated, Section 13-801 does. SBC's argument that its combining obligations under Section 13-801 must be similarly limited is in error, as fully

explained in Staff's response to SBC's exception to UNE Issue 10 beginning on page 13 of this Brief on Exceptions.

#### **4. UNE Issue 17**

AT&T contends that the Proposed Order should include language that deals with situations in which the OCN is not provided to AT&T SBC. AT&T BOE at 48-49. Staff agrees. If SBC Illinois fails to provide the OCN of the originating carrier in the usage records, then AT&T should be able to treat this traffic as though it was originated by SBC Illinois (after AT&T makes a second request for the OCN and it is not forthcoming from SBC). Staff, therefore, agrees with AT&T's proposed replacement language on pages 49 to 50 of its Brief on Exceptions. However, since SBC contends that it will not be able to provide OCNs to AT&T until SBC Illinois has completed its ULS Port OCN project, the following sentence should be added:

SBC-Illinois will begin providing this OCN after SBC-Illinois completes its ULS Port OCN project, or the end of March 2004, whichever comes first.

#### **5. UNE Issue 18(a)**

AT&T contends that the Proposed Order sides with SBC on this issue and rules that SBC should be allowed to maintain its "versioning" policy. AT&T responds that this ruling will create considerable practical difficulties for AT&T. AT&T further argues that the Proposed Order is discriminatory and anti-competitive. AT&T BOE at 50.

If the OSS modification at issue is important to AT&T, then it should be willing to pay SBC for the OSS modification costs necessary for SBC to accommodate orders from AT&T and a HBSS that are not on the same LSOG version. SBC has apparently

altered the OSS to accommodate line sharing orders from a HBSS not on the same LSOG version as SBC, and presumably absorbed the associated modification costs. Similarly, AT&T should be willing to absorb the OSS modification costs if it wants SBC to accept orders from a partner HBSS not on the same LSOG version.

#### **D. Local Number Portability ("LNP") Issues**

##### **1. LNP Issue 2**

AT&T takes exception to the Proposed Orders conclusion that the parties negotiate terms once an enhanced LNP Process is introduced by SBC. If AT&T's proposal is accepted, Staff continues to support the use of the BFR process for LNP 2, for the reasons set forth above in GTC 7.

#### **E. Intercarrier Compensation Issues**

##### **1. Intercarrier Compensation Issue 1, UNE Issues 27 and 29, and Pricing Issue 4**

AT&T takes exception to the Proposed Orders conclusion relating to the reciprocal compensation rate applicable in circumstances where AT&T provides local service to its customers using ULS-ST. AT&T asserts that:

...Ameritech itself submitted cost studies demonstrating that the underlying costs are different and the Commission, after seventeen months of investigating Ameritech's cost studies for those two reciprocal compensation scenarios, agreed that the costs are different and adopted two different TELRIC-based reciprocal compensation rates – one for terminating traffic in a facilities-based environment (\$0.00374) and a different and lower rate for terminating traffic in a situation involving the use of ULS-ST switch port (\$.0011).

AT&T BOE at 83. AT&T's assertions are confusing and misleading, if not simply erroneous.

The Commission did not, within Docket No. 96-0486/0569, adopt a terminating traffic rate in a situation involving use of ULS-ST switch port equal to \$0.0011. As AT&T's own witness Daniel P. Rhinehart explains, SBC Illinois filed a ULS-ST tariff in October of 2000 in response to the Commission's Order in Docket No. 98-0555 ("SBC-Ameritech Merger Order") which introduced the \$0.0011 for ULS-ST Reciprocal Compensation. AT&T Ex. 4.0 at 5.

AT&T's implication that different TELRIC-based reciprocal compensation costs for terminating traffic in a facilities-based environment and for terminating traffic in a situation involving the use of ULS-ST switch port were compared side by side over a seventeen month period and determined to be different is also incorrect. TELRIC-based reciprocal compensation costs for terminating traffic were developed based on SBC's switching cost models and studies filed in Docket No. 96-0486/0569. Based upon these studies SBC tariffed the \$0.00374 rate. SBC submitted revised switch cost models and studies in response to the Commission's Order in Docket No. 98-0555. These switch cost studies differed from those SBC relied on in Docket No. 96-0486/0569 in that SBC relied on its own ARPSUM (Ameritech Regional Partners In Provisioning Switching Model) rather than the Bellcore model it had previously relied on to develop switch costs. *Illinois Bell Telephone Company - Investigation into tariff providing unbundled local switching with shared transport*, Docket No. 00-0700, Order at 6 (July 10, 1002) ("00-0700 Order"). Thus, AT&T's implication is incorrect for two reasons. First, TELRIC-based reciprocal compensation costs for terminating traffic in a facilities-based environment and for terminating traffic in a situation involving the use of ULS-ST switch port were not compared side by side. Second, SBC proposed switch

models and studies in Docket No. 00-0700 that produced estimates for the very same switching costs that SBC had previously estimated in Docket No. 96-0486/0569. Based upon differences in estimation methodology and input changes, SBC's proposed cost estimates for switching and thus for terminating traffic changed. These changes implied that all of SBC's switch costs changed over time and/or changed due to improved estimation methodology. These changes did not and do not imply that TELRIC-based reciprocal compensation costs for terminating traffic in a facilities-based environment and for terminating traffic in a situation involving the use of ULS-ST switch port are different.

Furthermore, the Commission did not agree that the costs are different and adopt two different TELRIC-based reciprocal compensation rates. In Docket No. 00-0636 SBC Illinois explained:

On August 23, 2000, Ameritech Illinois filed, under cover of a transmittal letter designated as Advice No. 7329, tariff sheets comprising a new Section 21 of Part 19 of Ill.C.C. No. 20 ("Section 21"). Section 21 establishes rates and terms and conditions for ULS-ST in accordance with Condition 28(B) of the Commission's Order, dated September 23, 1999, in Docket 98-0555, approving the merger of Ameritech Corporation and SBC Communications, Inc (the "Merger Order"). Condition 28(B) requires that Ameritech Illinois make ULS-ST, in the form established in Section 21, available no later than October 8, 2000, 12 months following the merger closing date. Accordingly, the tariff sheets filed on August 23, 2000 to be effective on October 8, 2000.

SBC Illinois Petition in Docket No. 00-0636 at 1-2.

This proposed tariff filed by SBC contained, among other rate elements, rate elements for ULS-Originating Usage (for ULS-ST), ULS-Terminating Usage (for ULS-ST), and ULS-ST Reciprocal Compensation. The proposed rates for ULS-Originating Usage (for ULS-ST), ULS-Terminating Usage (for ULS-ST), and ULS-ST Reciprocal Compensation were each \$0.0011 per minute of use or fraction thereof. As noted by

SBC these three elements were based on the same switch cost studies. SBC Brief on Exceptions in Docket No. 00-0700 at 3.

Pursuant to negotiations with Staff, SBC agreed to reduce its ULS Originating Usage and ULS Terminating Usage rates to zero in order to prevent suspension of its tariff and to permit SBC's ULS-ST offering to become available, without suspension, on October 8, 2000. SBC Illinois Amended Petition in Docket No. 00-0636 at 2. In Docket No. 03-0636, the Commission granted SBC's Amended Petition for Permission to Place Into Effect On Less Than 45 Days Notice Revisions To ULS-ST Rates, Terms, and Conditions. Therefore, on October 9, 2000 SBC's tariff, which included rates of \$0.0 for ULS-Originating Usage (for ULS-ST) and ULS-Terminating Usage (for ULS-ST), became effective.

The Commission thus permitted SBC to file new switching rates based on a new uninvestigated study. The Commission, however, subsequently did investigate SBC's tariff and underlying studies in Docket No. 00-0700. The Commission's findings in Docket No. 00-0700 are revealing in two respects. First, the Commission rejected SBC's \$0.0011 estimates for ULS-Originating Usage (for ULS-ST) and ULS-Terminating Usage (for ULS-ST) and the studies underlying these cost estimates. 00-0700 Order at 4-5. As noted above, the cost studies rejected by the Commission were the very same studies used to compute the ULS-ST Reciprocal Compensation Rate Element. Second, the Commission concluded that "...reciprocal compensation decisions[] require extensive cost studies, that [were] not present in . . . docket [00-0700,]" and "[b]ased upon the record before [it], . . . reject[ed] Ameritech's inclusion of reciprocal compensation terms in its ULS-ST tariff." 00-0700 Order at para. 90.

The main thrust of AT&T's position is that, contrary to the plain language of its Order in Docket No. 00-0700, the Commission intended for SBC Illinois to include in their tariff a ULS-ST Reciprocal Compensation Rate Element of \$0.0011. AT&T's argument would necessarily imply that the Commission rejected the cost study supporting the ULS-ST Reciprocal Compensation Rate Element, found there to be insufficient evidence in the docket to support any reciprocal compensation rate, then instituted the \$0.0011 rate anyway. This interpretation is incorrect.

In its Initial Brief, Staff stated that standing alone, and omitting the plain language of the Commission ordering SBC to exclude reciprocal compensation rates from its ULS-ST tariff, the Commission's language in Docket No. 00-0700 might be interpreted to require SBC to retain the \$0.0011 rate in its ULS-ST tariff. Staff, however, argued that the plain language of the Commission's Order resolves any such uncertainty. Staff IB at 72. Staff reasserts that the plain language of the Commission's order should resolve any such uncertainty. However, the Proposed Order does not reflect Staff's position with respect the interpretation of the Order in Docket 00-0700. The finding in the Proposed Order is presumably based not on plain language, but on the context of the Commission's decision. As the above discussion reveals, the \$0.0011 rate was never approved by the Commission and is based upon a cost study that the Commission explicitly rejected. Thus, a broader inquiry into the context of the decision reinforces rather than contradicts the plain language of the Commission's Order.

The Proposed Order is correct in determining that there is simply no evidence in this proceeding, or to Staff's knowledge in any other Commission proceeding, that the reciprocal compensation rate SBC assesses AT&T when AT&T originates an interswitch

call using SBC's UNEs should differ from the reciprocal compensation rate SBC assesses AT&T when AT&T originates a call using its own facilities. Therefore, it is Staff's position that the Proposed Order correctly determines that the TELRIC-based reciprocal compensation rates for terminating traffic in a facilities-based environment and for terminating traffic in a situation involving the use of ULS-ST switch port ULS-ST traffic should be the same.

Accordingly, Staff recommends that the Commission reject AT&T's exception and modify the final three paragraphs on page 113 of the Proposed Order as follows:

~~—— We do not agree with SBC's interpretation of Docket 00-0700. SBC's proposal, in Docket 00-0700, urged the Commission to adopt reciprocal compensation for terminating a ULS-ST call. Each party would pay the other the same rate for terminating calls. SBC proposed that it be based on a minute of use charge. The Commission rejected SBC's proposal because it was based on a minute of use charge, or in other words, because it was not a flat rate. The Commission also stated that SBC's proposal to have the reciprocal compensation rates be symmetrical had merit. Importantly, however, the Commission concluded its decision by declining to act because of the "dearth" of evidence. Id. at 24. Given that the Commission declined to make a decision, the reciprocal compensation rates for ULS-ST that were in place prior to that decision should have remained. We emphasize, however, that this statement regarding SBC's tariff filing in response to Docket 00-0700 merely serves to reject Docket 00-0700 and SBC's tariff as the basis for our decision on this issue in this Arbitration Proceeding.~~

~~—— Prior to Docket 00-0700, the reciprocal compensation rates included in the LSST tariff differed from SBC's general tariffed reciprocal compensation rates. These tariffs were not symmetrical, however, and only applied to calls that originated on AT&T's network and terminated on SBC's network. That rate was 0.0011. Calls that originated on SBC's network and terminated on AT&T's network were subject to SBC's regular reciprocal compensation rates.~~

We decline to base our decision in this Arbitration Proceeding on Docket 00-0700 and SBC's tariff. Neither SBC nor AT&T propose that the asymmetrical ULS-ST tariffs that were in place prior to Docket 00-0700 be reinstated, which further strengthens our resolve that Therefore, we believe this issue must be decided on some other basis. AT&T proposes

symmetrical rates at 0.0011 and SBC proposes that its local reciprocal compensation rate be applied reciprocally.

## **2. Intercarrier Compensation Issue 2B**

AT&T takes exception to the Proposed Order with respect to Intercarrier Compensation Issues 2A and 2B. As the Proposed Replacement Language submitted by AT&T reveals, AT&T's exceptions are directed entirely at the Proposed Order's finding for Intercarrier Compensation Issue 2B. AT&T BOE at 90-92. Staff therefore addresses AT&T's arguments as they relate to Intercarrier Compensation Issue 2B only.

AT&T offers three arguments why the Commission should reject the Proposed Order's decision. First, AT&T argues that it is arbitrary and capricious to require ISP-bound traffic to be exchanged based on a bill and keep arrangement. AT&T BOE at 88. AT&T offers little support for this charge apart from the fact that its previous agreement did not include such an arrangement. As recognized in the Proposed Order the Commission has repeatedly held in recent proceedings that FX-like traffic is subject to bill and keep and further that applying this arrangement to ISP-bound FX traffic is consistent with current Commission and FCC reciprocal rules and policy. Proposed Order at 119. The Proposed Order thus selects a different arrangement than the arrangement in the previous AT&T/SBC interconnection agreements based on the fact that the new arrangement better comports with current rules and policy than does AT&T's proposal to maintain the arrangement from its previous interconnection agreement. Therefore, the Proposed Order's resolution is neither arbitrary nor capricious as asserted by AT&T.

Second, AT&T argues that the Commission does not have jurisdiction to resolve this issue because it dismissed an intercarrier compensation rulemaking in Docket No. 00-0555, did not rule on ISP bound traffic issues when addressing a complaint in Docket No. 01-0427, and referred to its Docket No. 01-0427 decision in its decision in Docket No. 02-0253. As noted in the Proposed Order the “ISP Remand Order found that state commissions may not impose their own reciprocal compensation regime for ISP bound traffic. The power has been preempted by the FCC.” Proposed Order at 119. This finding in the Proposed Order is consistent with the Commission’s decision to dismiss Docket No. 00-0555 which was established to impose a reciprocal compensation regime for ISP bound traffic. See Initiating Order in Docket No. 00-0555 at 2. (“...the Commission should initiate a rulemaking proceeding in which to determine the just and reasonable reciprocal compensation mechanism for ISP-bound traffic” ) Therefore, in contrast to AT&T’s assertion, the decision in the Proposed Order is fully consistent with the Commission’s decision to dismiss the rulemaking in Docket No. 00-0555.

The Proposed Order is also correct in ensuring that this issue is resolved in a manner that ensures that FCC decisions are enforced. As AT&T notes, the Commission determined in Docket 01-0427 (and simply made reference to in Docket No. 02-0253) that it would not resolve a dispute in a complaint case involving intercarrier compensation for ISP bound traffic. AT&T BOE at 90. Staff concurs that such complaints should be directed to the FCC and not this Commission. However, the Commission should enforce FCC decisions when carriers have, as both parties have

done here, requested the Commission to resolve language disputes in an arbitration of their Section 251 and 252 interconnection agreement. Staff IB at 80.

Finally, AT&T argues that it is inconsistent with the FCC's ISP Remand Order to order bill and keep for AT&T because the Commission did not order bill and keep for AT&T FX traffic prior to the release of the FCC's ISP Remand Order. AT&T BOE at 89-90. The Commission did, however, order bill and keep for FX traffic prior to the release of the FCC's ISP Remand Order. See Commission Order in Docket 00-0332 at 10. Thus, this Commission did in fact order ILECs to exchange FX or FX-like traffic under a bill and keep arrangement prior to release of the FCC's ISP Remand Order. AT&T notes the FCC's statement that:

...because 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.)

AT&T BOE at 89. As this statement indicates, it is consistent with the FCC's rules for the Commission to continue to require SBC, as it had prior to release of the FCC's ISP Remand Order, to exchange FX or FX-like traffic on a bill and keep basis.

For these reasons, Staff recommends that the Commission adopt the Proposed Order's resolution of Intercarrier Compensation Issue 2B.

### **3. Intercarrier Compensation Issue 2C**

AT&T takes exception to the Proposed Order's finding that the parties should exchange FX or FX-like voice traffic upon a bill and keep basis. AT&T states that it has offered un rebutted evidence regarding this issue that has been ignored by the Proposed Order. First, AT&T argues "SBC's position here is directly contrary to what SBC has

advocated in its other states, most notably in Michigan.” AT&T BOE at 93. The Commission should reject this argument. The Commission should resolve this issue in a manner that best comports with Commission and FCC rules and policy and not on what positions the parties might have taken in other jurisdictions. Of course, if a party’s position in another proceeding corrected facts in error in this proceeding or provided compelling arguments not presented in this proceeding, then the Commission might consider those facts or arguments if introduced into this proceeding. However, the Commission should not simply reject a party’s position because that party has taken a different position in a different proceeding in another jurisdiction.

Second, AT&T argues that “AT&T and SBC today compensate one another for voice FX calls in the same manner as other local traffic.” AT&T BOE at 93. The Commission should also reject this argument. As explained with respect to Intercarrier Compensation Issue 2B, the Commission should resolve this issue in a manner that best comports with current Commission and FCC rules and policy and not on the previous arrangement between the parties.

Third AT&T argues that “SBC offers voice FX service as a local exchange service – and not as an access or toll service – in its tariff.” AT&T BOE at 93. The Commission should reject this argument. Both parties offer FX or FX-like service to their customers. The Proposed Order states that “because of the value of FX-like services to end-users, we will not direct AT&T to stop offering FX-like services through our numbering authority.” Proposed Order at 123. There is no doubt that FX or FX-like service enables end-users to send or receive traffic that would otherwise be toll traffic at local exchange service rates. This service thus has characteristics of both local and toll

service. Arguably, because the service is designed to “appear” as local service to end users it should for end-user convenience appear in SBC’s local exchange tariffs. However, this does not imply that because of its inclusion in SBC’s local exchange tariff that reciprocal compensation rates should apply. The Commission should again reject AT&T’s argument and resolve this issue in a manner that best comports with current Commission and FCC rules and policy and not based upon which retail tariff SBC includes the service in.

Fourth, AT&T argues that “Under the FCC’s long-standing Separations policies, all retail FX revenue is deemed to be basic local service revenue.” AT&T BOE at 93. There is nothing to imply that separations policy can or should dictate Commission’s rules and decisions regarding reciprocal compensation arrangements. The Commission should again reject AT&T’s argument and resolve this issue in a manner that best comports with current Commission and FCC rules and policy and not based upon how the party’s treat their revenues for accounting purposes.

Finally AT&T argues that “[w]hile proposing that voice FX calls should no longer be treated as local for reciprocal compensation purposes, SBC is refusing to agree that it cease treating such traffic as local in all other regards.” AT&T BOE at 93. Staff is unclear what other treatment of voice FX calls that AT&T seeks. However, at issue is how voice FX or FX-like calls are to be treated with respect to intercarrier compensation. The Commission should resolve the issue raised in a manner that best comports with current Commission and FCC rules and policy.

In sum, the evidence that AT&T cites as unrebutted and unique in this proceeding is immaterial to proper resolution of this issue. Therefore, the Commission

should, in fact, ignore it and resolve this issue, as the Proposed Order, does based upon on pertinent evidence.

AT&T makes an additional argument that it does not assert has been unrebutted. AT&T argues “[v]oice FX-like traffic, as was explained in AT&T extensive testimony and briefs, does not fall within the Section 251(g) carve out.” AT&T BOE at 93. Even if correct, the Commission is free to do as it did prior to the FCC’s ISP Remand Order to establish a bill and keep arrangement for FX or FX-like traffic. See Commission Order in Docket 00-0332 at 10.

## **F. OSS Issues**

### **1. OSS Issue 2**

SBC contends that the Proposed Order is wrongly decided on the facts with respect to OSS Issue 2. SBC BOE at 50-51. In particular, SBC alleges that (1) the “enormous” change to the ordering system required by “as is” ordering is not justified by any benefit to AT&T; (2) “as is” ordering is useful for UNE-P migration with no changes to the service and there is no reason why this category of orders should be accorded some special status by the Commission; and (3) AT&T’s concern with “errors on the order format” is not well founded. In addition, SBC argues that the Commission should not change the result reached in industry collaboratives and that it would be expensive to accommodate “as is” ordering.

Basically, SBC is arguing that the expense involved in altering OSS systems to accommodate “as is” ordering is not worth the benefit AT&T will obtain from “as is” ordering. Apparently, SBC believes that it knows better than AT&T what is in AT&T’s best business interests. But the issue is not how much benefit AT&T will obtain from

“as is” ordering. The issue is whether AT&T should have access to “as is” ordering if it is willing to pay the costs of accommodating “as is” ordering. The answer that inquiry is clearly yes. AT&T should not be denied the option of “as is” ordering. Only SBC Illinois can provide “as is” ordering to AT&T and as a monopoly provider SBC Illinois should not be able to dictate which services it will or will not offer competitors. AT&T should be able to purchase “as is” from SBC as long as it fairly compensates SBC for costs SBC incurs to provide “as is” ordering. It does not matter whether “as is” ordering is expensive to implement as SBC alleges, since AT&T will reimburse any costs SBC will incur to accommodate “as is” ordering. Moreover, if “as is” ordering is as expensive to implement as SBC contends (an extremely questionable contention in Staff’s view) then AT&T will not elect to purchase “as is” ordering from SBC.

If AT&T is wrong about the benefits it will derive from “as is” ordering, then it will pay the costs of this bad business decision. Even if AT&T is incorrect in its own cost/benefit analysis, SBC will be fully compensated for any expenses that it incurs to modify its OSS systems to accommodate “as is” ordering and consequently will not suffer any harm or loss.

## **G. Pricing Issues**

### **1. Pricing Issue 5a-5b**

In its BOE, SBC contends that its pricing schedule should be modified to reflect the LIDB definition and prices consistent with tariffs filed on June 6, 2003 to be effective on July 22, 2003. Staff agrees with this position. It has always been Staff’s contention that in the event the parties don’t agree about other rates, then the tariffs should be referred to for guidance on prices and terms of services. SBC is correct that a new tariff

for LIDB went into effect on July 22,2003. That tariff should serve as the basis for prices and terms for LIDB services.

### **III. CONCLUSION**

WHEREFORE, Staff of the Illinois Commerce Commission respectfully requests that the Proposed Order be modified consistent with Staff's Brief on Exceptions prior to being submitted to the Commission for consideration, and that the exceptions of AT&T and SBC discussed above be denied in accordance with the arguments set forth above.

Respectfully submitted,

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