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**LEVEL 3 COMMUNICATIONS, LLC)
)
Petition for Arbitration Pursuant to)
Section 252(b) of the Telecommunications)
Act of 1996 to Establish an Interconnection)
Agreement with Illinois Bell Telephone)
Company d/b/a Ameritech Illinois)**

Docket 00-0332

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**AMERITECH ILLINOIS'
BRIEF ON EXCEPTIONS**

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Illinois Bell Telephone Company (“Ameritech Illinois”), respectfully excepts to the recommendations in the Hearing Examiners’ Proposed Arbitration Decision (“HEPAD”) identified below. On several issues, Ameritech Illinois objects to only part of the HEPAD recommendation. Accordingly, and to avoid any possible confusion, we state at the beginning of each exception the extent to which Ameritech Illinois objects to the HEPAD on the issue in question.

For each item on which Ameritech Illinois takes exception, the proposed replacement language for the HEPAD required by Ill. Admin. Code § 761.430 is set forth in the Attachment to this brief.

There are a number of recommendations in the HEPAD with which Ameritech Illinois disagrees but to which Ameritech Illinois is not taking exception. By thus focusing on the issues on which it believes the HEPAD is most in need of correction, Ameritech Illinois does not waive its right to challenge in subsequent proceedings HEPAD determinations that it does not challenge here.

Issue 1: Reciprocal Compensation

A: Definition of “Local Calls” and Reciprocal Compensation

Ameritech objects to the HEPAD recommendation on issue 1A in its entirety.

As the HEPAD states (at 3), the Commission addressed the question of inter-carrier compensation on ISP traffic in the Focal/Ameritech Illinois arbitration, Docket 00-0027, where it concluded that ISP traffic is local and therefore subject to reciprocal compensation. Ameritech Illinois disagrees with that conclusion (and will contest it in subsequent proceedings), but does not challenge it in this brief. Even assuming that ISP traffic is subject to reciprocal

compensation, however, the HEPAD's proposed resolution of Issue 1A cannot stand, because it requires Ameritech Illinois to compensate Level 3 at rates that unlawfully exceed Level 3's costs.

Section 252(d)(2)(A) of the Telecommunications Act of 1996 requires Level 3's reciprocal compensation rate to provide only for the "recovery by [Level 3] of costs associated with the transport and termination on [Level 3's] network facilities of calls that originate on the network facilities of [Ameritech Illinois]." As applied here, that means that the rate Level 3 charges Ameritech Illinois for delivering ISP traffic must, according to the controlling federal statute, allow Level 3 only to recover the costs it incurs when it transports and terminates that traffic. The HEPAD is contrary to law because it requires Ameritech Illinois to pay Level 3 reciprocal compensation at rates that reflect *Ameritech Illinois'* costs (not Level 3's costs) and the undisputed evidence shows that Level 3's costs are lower than Ameritech Illinois'.

- *First*, Ameritech Illinois' reciprocal compensation rates are based on the average voice call of approximately of 3½ minutes duration. The average Internet call, in contrast, lasts about 26 minutes. Because of the way Ameritech Illinois' reciprocal compensation rates were calculated — with the one-time "set-up cost" that is incurred for each call distributed over the 3½ minutes of the average call — Level 3 would in effect be recovering the set-up cost seven times for each call (instead of the one time that it should) if Level 3 were allowed to charge Ameritech Illinois' reciprocal compensation rates. (See Ameritech Illinois' Response on Issue 1A (filed June 2, 2000) at 24-25; Panfil Direct at 17-18; Harris Direct at 26-27.)

- *Second*, Level 3 has configured its network to minimize its costs for transporting and delivering ISP traffic. (Harris Direct at 28.) As Level 3's own witness explained, Level 3

“has deployed one of the world’s most advanced Internet Protocol networks” with an “advanced network architecture that incorporates state-of-the-art soft switches and network components that enable Level 3 to leverage advanced *cost efficient* technologies.” (Gavalas Direct at 10) (emphasis added.) That is good for Level 3, and good for competition. But what it translates into for purposes of Issue 1A is that Level 3, with its uniquely *cost efficient* technologies such as “soft switches,” incurs uniquely lower costs when it uses that network to deliver traffic to its ISP customers.

- *Third*, at least some of Level 3’s ISP customers collocate with Level 3 (Tr. 290) and, as Level 3’s witness admitted (Tr. 292-93), it costs less to deliver traffic to collocated customers than to non-collocated customers. (*See also* Harris Direct at 27.) There is no evidence that any Ameritech Illinois customers (ISPs or otherwise) collocate with Ameritech Illinois.

The HEPAD ignores this undisputed proof that Level 3's costs for delivering ISP traffic are significantly lower than the costs on which Ameritech Illinois’ reciprocal compensation rates are based, and therefore fails to reach the inevitable conclusion — that Level 3 cannot lawfully be permitted to charge reciprocal compensation *at Ameritech Illinois’ cost-based rates* when Level 3 delivers traffic to its ISP customers. And again, the fact that the Commission ruled in the Focal arbitration that ISP traffic is local and therefore subject to reciprocal compensation does not support the HEPAD in this respect. Nothing in the Commission’s Conclusion at page 12 of the Focal Arbitration Decision remotely endorses the notion that a CLEC should be allowed to charge reciprocal compensation at rates that do not reflect its costs.

Once the Commission accepts that section 252(d)(2)(A) of the 1996 Act prohibits Level 3's rates from being based on Ameritech Illinois' costs, what should the Commission do? In theory, of course, the Commission should set Level 3's rates based on Level 3's costs. Level 3, however, has rendered it impossible for the Commission to do that with any precision, because despite that fact that somewhere between 95% and 100% of all the dial-up traffic Level 3 carries is ISP traffic (Tr. 245), Level 3 says it has no idea what its costs are for delivering that traffic to its ISP customers. (*See Ameritech Illinois' Post-Hearing Brief ("AI Br.")* 2-3.) The correct legal answer to the question of what the Commission should do is therefore that it should set Level 3's reciprocal compensation rate for ISP traffic at zero. It is Level 3 that wants the compensation, and it is Level 3 that should therefore prove its costs. Having failed to do so, Level 3 should be required to charge a zero rate until either the Commission reaches a different conclusion in the generic proceeding or Level 3 proves its costs.

Ameritech Illinois recognizes, however, that the Commission will likely prefer to set a reciprocal compensation rate for Level 3 that is an approximation (even if a rough one) of Level 3's costs. Accordingly, Ameritech Illinois recommended in its post-hearing brief, and again recommends, that the Commission authorize Level 3 to charge Ameritech Illinois \$.001333 per minute for delivering traffic to its ISP customers. That figure, which is based on Ameritech Illinois' current end office termination rate, adjusted for *some* of the cost savings that Level 3 enjoys and that are described above, is the only figure in the record that at least bears some rational relationship to Level 3's likely costs. (*See Panfil Direct* at 17-19 for the derivation of the proposed \$.001333 rate.)

Finally, whether or not the Commission adopts the rate proposed by Ameritech Illinois, the Arbitration Decision should make clear that the rate in the parties' agreement will be adjusted in accordance with the result of the Commission's generic proceeding on ISP traffic, with a true-up retroactive to the Effective Date of the agreement.

B. Eligibility for Tandem Compensation

Ameritech objects to the HEPAD recommendation on this issue in its entirety.

The HEPAD concludes that Issue 1B has not come to fruition yet, and also concludes that the issue should be deferred to the generic docket on ISP traffic that the Commission plans to conduct. We first explain why Issue 1B cannot properly be deferred to the generic ISP proceeding, and then propose a resolution of Issue 1B that should be uncontroversial.

Generally, Issue 1B concerns whether Level 3 will charge Ameritech Illinois the so-called end office termination rate or the higher tandem rate when Level 3 terminates local traffic that originates on Ameritech Illinois' network. It must be understood that this question is not limited to ISP traffic; rather, it pertains to any and all local traffic that originates on Ameritech Illinois' network and that terminates on Level 3's network, *i.e.*, any and all traffic that is subject to reciprocal compensation. (In practice, of course, almost all traffic on Level 3's network is ISP traffic; in theory, however, the traffic that Level 3 terminates and that is subject to reciprocal compensation will include such regular voice traffic (if any) as Level 3 may carry in the future, and it will *not* include ISP traffic if the Commission ultimately decides in the generic docket that ISP traffic is not subject to reciprocal compensation under section 251(b)(5) of the 1996 Act.)

Level 3 is not claiming it is entitled to charge the tandem rate as of today. (Tr. 247.) Rather, the question presented by Issue 1B is how the parties' agreement should articulate the

test that Level 3 must pass at some later date, when and if Level 3 contends it qualifies to charge the tandem rate, with each party advocating a different test for inclusion in section 1.1.29.2 of the General Terms and Conditions of the parties' agreement.

In light of the foregoing, Issue 1B ought not be deferred to the generic ISP proceeding, because there is no reason to believe that the Commission will address in that proceeding the general question of what test a CLEC's switch must pass in order to qualify for the tandem rate — a question that is not at all peculiar to ISP traffic. Thus, the Commission should address Issue 1B in some fashion in its Arbitration Decision — that is, it should provide some language for the parties' agreement concerning the test Level 3 will eventually have to pass in order to qualify for the tandem rate — but the Commission need not (in fact cannot, based on the record in this proceeding) decide whether Level 3's switch qualifies for the tandem rate today.

As it happens, there is an easy answer to the question what language should be included in the parties' agreement, an answer about which neither party can conceivably complain. Section 1.1.29.2 should simply provide, "A Level 3 switch will be classified as a Tandem Switch when and to the extent that it meets the requirements of 47 C.F.R. section 51.711(a)(3) applied consistently with paragraph 1090 of the FCC's First Report and Order (FCC 96-325) in CC Docket No. 96-98." To be sure, that defers to another day the question the parties have been debating, namely, how Rule 51.711(a)(3) and paragraph 1090 should be applied.¹ But this deferral is eminently practical. When Level 3 believes that its network has developed to the point that qualifies Level 3 to charge the tandem rate, Level 3 will take the matter up with

¹ The parties' differing positions on how the FCC's test should be applied are discussed at pages 8-10 of Ameritech Illinois' Post-Hearing Brief.

Ameritech Illinois, and the parties will either agree or disagree. If they disagree, the Commission will be called upon to decide the matter and then, with the pertinent facts available, the Commission will be in a position to decide exactly how to apply Rule 51.711(a)(3) and paragraph 1090.²

Issue 2: Deployment of NXX Codes

Ameritech concurs with the HEPAD recommendations that (1) the parties' agreement make clear that if an FX call would not be local based on the distance it travels, it shall not be subject to reciprocal compensation, and (2) the parties' agreement shall include Appendix FGA.

Ameritech objects to the HEPAD recommendation that the parties' agreement permit Level 3 to obtain free interexchange transport and switching for Level 3's FX service.

In its post-hearing brief, Ameritech Illinois demonstrated why it should not have to provide free interexchange transport and switching to subsidize Level 3's FX services, and why the parties' contract should therefore require each party to be compensated for the portion of the FX service that it provides. The HEPAD seems to agree with Ameritech in principle (plainly, it does not *disagree*), but nonetheless rejects Ameritech's position, on grounds that have nothing to do with the merits of the issue. Specifically, the HEPAD says (at 7),

² The HEPAD contains an error that will fall away if the proposal set forth above is accepted, but that otherwise would need to be corrected. It says (at 4), "The decision of functionality rests as stated in the Focal decision [on] whether this Commission is desirous of setting disparate reciprocal compensation rates . . . depending upon whether the traffic is terminated in an end office switch of a tandem switch." In reality, the Focal Arbitration Decision did *not* say that. Rather, what it said (at 7) is that a fair reading of the FCC's *First Report and Order* may lead to that conclusion, but that the Commission "need not reach that issue here." The HEPAD should not reflexively convert the Commission's musing about what *may* be a fair reading into a new rule (especially here, where it is unnecessary and, Ameritech Illinois submits, the new rule would be mistaken).

Both the record and the time constraints that drive these proceedings mitigate against any meaningful review of the intercarrier compensation portion of the dispute [*i.e.*, the question of how the parties should be compensated when they both play a role in providing an FX service to Level 3's customers]. While we see some merit to AI's position, the language it proposes is not detailed or developed enough or supported by the type of evidence necessary to gain our confidence. . . . Moreover, while the premise AI offers may be meritorious to some degree, the particular methodology advanced does not show itself as the most reasonable for the task. Hence, we agree with Level 3 to the extent that AI's proposal is ill-defined and cannot be included in the agreement.

That discussion fails to come to grips with the question presented by Issue 2. There is not an inkling of a suggestion there that Ameritech is wrong in its core position that it should not have to provide free interexchange transport and switching for Level 3's FX service. (Nor, realistically, could there be, given the demonstration at pages 11-23 of Ameritech's post-hearing brief.) Instead, the HEPAD in effect requires Ameritech Illinois to provide those services to Level 3 for free on the stated grounds that (1) the arbitration schedule dictated by Congress is too tight to allow for meaningful consideration of the issue; (2) Ameritech Illinois did not offer "the type of evidence necessary to gain our confidence"; (3) Ameritech's proposed contract language is "not detailed enough or developed enough"; and (4) "the particular methodology advanced does not show itself as the most reasonable for the task." Those rationales fall far short of a justification for the wrong result (a result that the HEPAD almost concedes is wrong) on this important issue.

As to point (1), the tightness of the schedule, while undeniable and regrettable, cannot justify an erroneous decision.

As to point (2), there was no shortfall in Ameritech Illinois' evidence — and indeed, the HEPAD does not identify any particular deficiency in that evidence. Ameritech Illinois' position was more than amply supported by 26 pages of pre-filed testimony by Dr. Debra Aron

and nine pages of pre-filed testimony by Eric Panfil – none of which was meaningfully challenged on cross-examination. Furthermore, there is no real *factual* dispute concerning the issue in any event, as can be confirmed by reviewing the recitation of the parties' positions at pages 5-7 of the HEPAD. What one sees there are disagreements about policy, but not one disagreement about, for example, what happens on the network or how NXX codes are assigned. Thus, the rejection of Ameritech Illinois' position cannot be justified based on any inadequacy in the evidence. This, presumably, is why the HEPAD does not specify what the asserted inadequacy is.

As to point (3), the asserted lack of "detail" and "development" in Ameritech's proposed contract language also cannot justify the result the HEPAD reaches. If Ameritech Illinois is correct in its core position that it should not have to give Level 3's FX service a free ride on the Ameritech network and that each carrier should be compensated for the portion of the service it actually provides – and the HEPAD certainly gives the impression that Ameritech Illinois' core position is right – Level 3 should not prevail merely because the Commission is not 100% satisfied with the contract language Ameritech has offered to embody its position. Imperfect language that at least gets at the right result is obviously preferable to language (or in this instance, absence of language, which is functionally the same thing) that achieves the wrong result. And to the extent the Commission may believe there are significant inadequacies in Ameritech's proposed language (none of which is identified in the HEPAD), the proper course would be to require Ameritech to cure whatever the perceived inadequacies may be.

Moreover, while some arbitration issues have more to do with contract language than with meaty substantive differences between the parties, the issue here is profoundly substantive.

In fact, if the Commission looks at Level 3's presentation of Issue 2 at pages 10-11 of its Petition for Arbitration, the Commission will see that there is no mention of any problem with Ameritech's proposed *contract language*. Rather, everything that Level 3 said in its petition about Issue 2 had to do with the parties' substantive disagreement concerning who should compensate whom for the FX services that Level 3 provides using Ameritech's network. Given the very real policy and economic differences between the parties' positions, sound decision-making requires a resolution based on substance, not on asserted (and, again, unidentified) glitches in the language offered by the party who is correct on the substance.

Finally on this point (and least important, because any asserted deficiencies in the proposed contract language can be cured), Ameritech Illinois respectfully submits that its proposed language, which appears at page 15 of its post-hearing brief, is not insufficient in detail or development in any event. Quite the contrary, the parties' agreement will be full of provisions (some negotiated and some arbitrated) that are no more detailed or developed. As to the specific inadequacies that Level 3 asserted in its post-hearing brief (but that were *not*, it bears repeating, asserted in Level 3's Petition for Arbitration, *or* adopted in the HEPAD):

- The occasional references to "FX-like" service in section 1.1 of Appendix FX (*see* Level 3's Post-Hearing Brief ("L3 Br.") 35) is a perfectly legitimate means to ensure that the CLEC cannot evade the provisions that apply to FX service by slightly tweaking the service and giving it another name. In application, the use of the term "FX-like" should not cause a problem: For now, it refers to FX service alone; if a CLEC were to try to evade the FX provisions in the manner just described, the parties might get into a dispute about the exact scope of "FX-like," but the possibility of such a dispute is no reason to scrap the legitimate protection that Ameritech seeks. Finally, if the Commission is troubled by the term "FX-like," it could order that it be changed to "FX."³

³ The HEPAD itself, however, shows why the agreement should use the term "FX-like" where it does. The portion of the HEPAD that correctly holds reciprocal compensation shall not

- Level 3 argued that Ameritech Illinois' proposed FX provisions are "too vague" because they "refer[] to an unidentified amount of compensation . . . for undefined Ameritech facilities and services" (L3 Br. 35). That is nonsense. The facilities and services that Ameritech provides for Level 3's FX service were (1) described in Ameritech's testimony (e.g., Aron Direct at 5, lines 14-18; Panfil Direct at 34); (2) graphically depicted in Ameritech Cross Ex. Gates 1A; and (3) not in dispute – THEY ARE TRANSPORT AND SWITCHING. Nor is there anything mysterious about the compensation for that transport and switching; they are tariffed. And again, to the extent the Commission may feel that the contract language needs to be firmed up in this respect, that can easily be done.

Finally, as to point (4) in the HEPAD discussion quoted above, it is unclear what the HEPAD means when it says "the particular methodology advanced does not show itself as the most reasonable for the task." There is a strong suggestion there that the task — which is to eliminate the free ride that Level 3's FX service gets on Ameritech's network — is a commendable one, but that there is some other, unspecified, approach to the task that is more reasonable than the one Ameritech has proposed. If that is so, the Commission should impose that approach — just as the HEPAD recommends approaches on other issues (Issues 7 and 24) that were proposed by neither of the parties.

In sum, the HEPAD seems to recognize, as it must, that Ameritech Illinois should not have to provide free interexchange transport and switching to subsidize Level 3's FX services, and that the parties' contract should require each party to be compensated for the portion of the FX service that it actually provides, but then goes on to reject Ameritech Illinois' position for

apply to interexchange FX traffic states, "Whether designated as 'virtual NXX' which Level 3 uses, or as "FX" which AI prefers, this service works a fiction." (HEPAD at 7.) Plainly, the HEPAD understands that Focal's "virtual NXX" service is the same as Ameritech's "FX" service. If Ameritech's references to "FX-like" service are deleted from the contract, however, Level 3 might try to argue later that the "FX" provisions do not apply to *its* service, because its service is "virtual NXX" service rather than "FX" service.

reasons that do not withstand scrutiny. Ameritech Illinois has no doubt that the Hearing Examiners did what they thought best while operating under difficult time constraints. That said, however, Ameritech Illinois earnestly recommends that the HEPAD be changed as indicated in the replacement language for Issue 2 in the Attachment to this brief, so that the Arbitration Decision on this issue can withstand judicial review.

Issue 6: Term of the Agreement

Ameritech Illinois explained in its post-hearing brief (at 27-28) why it believes a one-year term would be optimal, but also stated that it would accept, and would not challenge, a two-year term as a compromise. Ameritech Illinois commends the HEPAD for its careful balancing of the considerations on both sides of this issue and, in the event that Level 3 takes exception to the result in the HEPAD, urges the Commission to adopt the recommendation in the HEPAD. To do otherwise would discourage parties from offering compromise positions in arbitrations, which would plainly be undesirable.

Issue 7: Deposits, Billing, and Payments

Ameritech takes exception to only one aspect of the HEPAD resolution of Issue 7, namely, an aspect in which the HEPAD decided a matter that was not presented as an issue by the parties.

Issue 7 presented several related matters, and the HEPAD for the most part addresses them. The HEPAD resolves the question of deposits (at 12-13) in a manner with which Ameritech does not altogether agree but which Ameritech does not challenge here. The HEPAD then resolves the question of the time within which Level 3 must notify Ameritech that it is disputing a bill (at 13), in a manner with which Ameritech agrees.

In that same paragraph, however, the HEPAD says, “An escrow deposit of the disputed amount shall not be required unless the number of disputes exceeds two per 12-month period.” That sentence should be deleted, because the parties did not put before the Commission any issue having to do with the point at which disputed amounts should be placed in escrow. This can be confirmed by looking at section 8.4 of the General Terms and Conditions of the parties’ agreement (Exhibit A to Level 3’s Petition for Arbitration). *Agreed* language in that provision states that if any portion of a bill is disputed, the party billed shall notify the billing party of the disputed amounts *and* that the non-paying party “shall pay when due all Disputed Amounts into an interest bearing escrow account with a Third Party escrow agent mutually agreed upon by the Parties.” Thus, the parties agreed that all disputed amounts would be placed in escrow, and neither party asked the Commission to decide at what point an escrow should be required. The HEPAD sentence quoted above should therefore be deleted.⁴

Issue 10: Third Party Intellectual Property Rights

Ameritech Illinois does not take exception to the HEPAD discussion of Issue 10, but responds as follows to the question posed to Ameritech Illinois at page 14 of the HEPAD.

Ameritech Illinois requests a provision (section 14.5.1.1 in the General Terms and Conditions) that sets forth its best efforts obligation under the FCC’s requirement:

[Ameritech Illinois] agrees to use its best efforts to obtain for [Level 3] under commercially reasonable terms, Intellectual Property rights to each unbundled network element necessary for [Level 3] to use such unbundled network element in the same manner as [Ameritech Illinois].

⁴ Section 252(b)(4)(A) of the 1996 Act expressly limits the arbitration to resolution of the issues the parties presented for decision.

This clause incorporates the FCC's "best efforts" requirement by adopting the core of the FCC's holding in its April 27 Order:

We conclude that the "nondiscriminatory access" obligation in Section 251(c)(3) requires incumbent LECs to use their best efforts to provide all features and functionalities of each unbundled network element they provide, including any associated intellectual property rights that are necessary for the requesting carrier to use the network element in the same manner as the incumbent LEC. In particular, incumbent LECs must exercise their best efforts to obtain co-extensive rights for competing carriers purchasing unbundled network elements.

Thus, Ameritech Illinois' proposed section 14.5.1.1 accurately sets forth the "best efforts" obligation recognized by the FCC. Moreover, although Level 3 objects to the phrase "commercially reasonable terms," that phrase does nothing to diminish Ameritech's obligation to use its best efforts to obtain co-extensive rights for Level 3. Rather, it makes clear that Ameritech is not obligated to obtain co-extensive rights from third parties under wholly unreasonable terms and conditions. This phrase merely establishes that Ameritech cannot reasonably be expected to be held hostage by third parties who may make unreasonable demands in the process of Ameritech's exercise of its best efforts on Level 3's behalf. And it also serves to protect Level 3 and other carriers in the sense that any commercially "unreasonable" terms that a vendor might demand, such as an exorbitant right-to-use fee, would have to be apportioned among all requesting carriers. Therefore, Ameritech's best efforts clause is fully consistent with the best efforts obligations established by the FCC.

Ameritech Illinois' proposed section 14.5.1.2 appropriately reflects Level 3's reciprocal obligation to obtain intellectual property rights in excess of the co-extensive rights which Ameritech must use its best efforts to obtain: "[Ameritech Illinois] shall have no obligation to

attempt to obtain for [Level 3] any Intellectual Property right(s) that would permit Level 3 to use any unbundled network element in a different manner than used by [Ameritech Illinois].”

Again, Ameritech’s language reflects the FCC’s holding on this point (at ¶ 16 of the FCC’s April 27 Order).

Section 251(c)(3) requires only that *the intellectual property rights provided to a requesting carrier will entitle that carrier to use the element for the same uses as the incumbent LEC*. To the extent the requesting carrier intends to use the element in a different manner (e.g., in combination with some other element not contemplated by the incumbent LEC’s particular license), the requesting carrier is solely responsible for obtaining this right from the vendor. (Emphasis added)

In fact, Ameritech’s proposed section 14.5.1.2 does nothing more than reiterate the above statement by the FCC. Therefore it properly establishes that Ameritech is obligated to attempt to obtain only those intellectual property rights that are necessary to entitle Level 3 to use unbundled network elements in the same manner (i.e., co-extensive) as Ameritech, and that it is not required to obtain any additional rights necessary to allow Level 3 to use network elements in a different manner than Ameritech.

Issue 14: Assignment

Ameritech concurs with the HEPAD recommendations on this issue, but asks that the Commission address the portions of the issue that the HEPAD did not address.

Ameritech Illinois’ post-hearing brief enumerated five disputes encompassed by Issue 14. (See AI Br. at 40-43.) Of these, the HEPAD resolves two in favor of Ameritech Illinois (namely, item *First*, starting at AI Br. 40, and item *Fourth*, starting at AI. Br. 42). The HEPAD does not, however, address items *Second*, *Third*, or *Fifth*. Accordingly, Ameritech Illinois respectfully requests that the Commission clarify that those three disputes are resolved in Ameritech Illinois’ favor.

Ameritech Illinois supported its position on these three matters in detail and with record support in its post-hearing brief (at 40-43), and incorporates that discussion by reference here. In addition, Ameritech Illinois notes that Level 3 provided virtually no support (and no record support) in its post-hearing brief for its positions on items *Second* and *Fifth*, and did not make even a passing reference to item *Third*.

Issue 19: Enhanced Extended Loops

Ameritech concurs with the HEPAD recommendation on termination and nonrecurring charges.

Ameritech takes exception to the HEPAD recommendation that Ameritech Illinois' proposed certification form be rejected, for the reasons set forth in Ameritech Illinois' Post-Hearing Brief at pages 47-50.

Ameritech takes exception to the HEPAD recommendation that ISP traffic is local exchange service for purposes of EEL certifications, for the reasons set forth below.

The HEPAD states (at 18): "In accordance with the decision of issue 1 and the previous decisions by this commission for purposes of EEL's ISP traffic should be regarded as local." That is a *non-sequitur*. The treatment of ISP traffic as "local" for purposes of reciprocal compensation simply does not imply that ISP traffic is "local exchange service" for purposes of EEL certifications. In fact, *both* parties' arguments on this issue focus on the June 2, 2000, FCC *Supplemental Order Clarification*, which specifically addresses the question of what constitutes local exchange service for purposes of EEL certifications. (*See* AI Br. 50-52.) Thus, the Commission should look for the answer to that question in the *Supplemental Order Clarification* — not in the altogether separate context of decisions on whether ISP traffic is "local" for purposes of reciprocal compensation. This is all the more clear when one considers that (1) the question here is *what the FCC meant* by "local exchange service" in the EEL certification

criteria it promulgated; (2) *the FCC* has not ruled that ISP traffic is local for purposes of reciprocal compensation; and (3) *the FCC* clarified in the *Supplemental Order Clarification* what *it* meant by “local exchange service” for purposes of EEL certifications.

Level 3 has contended that the service it provides to ISPs can be treated as local exchange service under footnote 64 of the *Supplemental Order Clarification*, which states that “[t]raffic is local if it is defined as such in a requesting carrier’s state-approved local exchange tariff and/or it is subject to a reciprocal compensation arrangement between the requesting carrier and the incumbent LEC.” Level 3 contends that ISP-bound traffic is “subject to a reciprocal compensation arrangement” with Ameritech Illinois and therefore falls within this footnote.

Level 3’s argument is foreclosed by the plain language of the *Supplemental Order Clarification*. The very footnote Level 3 cites is attached to a sentence that refers to the percentage of “local *voice* traffic” that the requesting CLEC must provide to meet the FCC’s criteria. *See Supplemental Order Clarification*, para. 22(b) (emphasis added.) Indeed, whenever the FCC refers to the percentage of local service that must be provided by the requesting CLEC, it refers explicitly to “local *voice* traffic” and “local *dialtone* service.” *Id.*, para. 22(b)-(c) (emphasis added.) The service Level 3 provides to ISPs is, by definition, a data service, and therefore is neither “local *voice* traffic” nor “local *dialtone* service.” Thus, ISP-bound traffic does not and cannot fall within the FCC’s requirements and therefore cannot be reclassified as “local exchange service” for purposes of CLEC certifications.

Footnote 76 of the *Supplemental Order Clarification* further supports this analysis. Footnote 76 states that “[w]ith regard to data services, we note that the local usage options we

adopt do not preclude a requesting carrier from providing data over circuits that it seeks to convert, *as long as it meets the thresholds contained in the options.*” (Emphasis added.) By drawing this distinction, the FCC clearly recognized that “data service” — such as service to ISPs — is *not* “contained in the options” that define a significant amount of “local exchange service.”

Accordingly, ISP-bound traffic does not meet the specific requirements of the *Supplemental Order Clarification* for local exchange traffic that can be counted in a CLEC’s certifications, and there is no reason or basis to depart from the FCC’s rule here. The parties’ agreement should therefore preclude Level 3 from treating ISP-bound traffic as local voice service in its certifications.

Issue 27: Points of Interconnection

Ameritech objects to the HEPAD recommendation that Level 3 not be required to establish a POI at a tandem until the volume of Level 3 traffic at that tandem reaches the equivalent of an OC-12 (8064 trunks) and urges that the threshold be set at the equivalent of an OC-3 (2016 trunks).

The HEPAD recommendation is based on an arithmetic error.

The parties, and the HEPAD, agree that Level 3 will establish new points of interconnection on a tandem-by-tandem basis once the volume of Level 3 traffic at a given tandem reaches a specified threshold. Level 3 proposed that the threshold be the equivalent of an OC-12 (8064 trunks). Ameritech Illinois proposed that the threshold be the equivalent of a DS-3 (672 trunks), but urged the Commission in the alternative to set the threshold at the equivalent of an OS-3 (2016) trunks rather than the unreasonably high number proposed by Level 3. (AI Br. 64.)

The HEPAD recommends Level 3's threshold (OC-12), and the first reason the HEPAD offers for that recommendation is based upon the percentage of the tandem that would be occupied by Level 3's trunks. According to the HEPAD (at 24), Level 3's proposed OC-12 threshold would occupy about 5.7% of a tandem and that, the Hearing Examiners apparently concluded, was a reasonable percentage at which to require Level 3 to establish a point of interconnection. (Although the HEPAD does not say so, the thought might well have been that with Ameritech making use of half or more of the tandem for the foreseeable future, and with a variety of other CLECs also establishing trunk groups at the tandem, it makes sense to require any one CLEC to unburden the tandem by establish a POI when that CLEC is occupying about 1/20th (5%) of the tandem.)

Ameritech Illinois does not take issue with the HEPAD's conclusion that Level 3 should be required to establish a point of interconnection when its trunks occupy on the order of 5% of the tandem. Unfortunately, however, the HEPAD was mistaken in its conclusion that that is the equivalent of an OC-12. The correct numbers are as follows:

- The average Ameritech Illinois tandem has 47,236 trunks.⁵
- An OC-12 is 8064 trunks. (See AI Br. 63.)
- Thus, an OC-12 occupies slightly more than 17% of a tandem, not the 5.7% that the HEPAD posited.
- To achieve the objective that the HEPAD apparently had in mind, the threshold should be set at the equivalent of an OC-3. An OC-3 is 2016 trunks, or

⁵ That figure is derived from the matrix with which Ameritech Illinois responded to Staff's data requests concerning Ameritech's network (sent via e-mail on July 28, 2000). The total number of trunks in that matrix divided by the number of tandems yields the average number of trunks per tandem: 47,236.

approximately 4.3% of a tandem, which is reasonably close to the 5.7% that the HEPAD thought it was achieving.

Two thousand sixteen trunks is a substantial number. With the average Internet call lasting 26 minutes (*see* Panfil Direct at 10), 2016 trunks can accommodate 4652 Internet calls per hour ($2016 \times 60 \div 26$). To require Level 3 to establish a point of interconnection at a tandem when it is putting that heavy a burden on the tandem is hardly an unfair burden on Level 3. To set the threshold at the equivalent of an OC-12 (8064 trunks, or 10,608 calls per hour), on the other hand, would, in the words of the HEPAD “place an extra burden on the ILECs and not encourage fiber and technical growth in the Chicago LATA.”

Accordingly, Ameritech Illinois urges the Commission to achieve one explicit objective of the HEPAD (to set the threshold “on an optical carrier level” (HEPAD at 24)), and to achieve one implicit objective of the HEPAD (to set the threshold at roughly 1/20th of a tandem) by setting the threshold at the equivalent of an OC-3.

Issue 34: Indemnity

Ameritech objects to the HEPAD recommendation on this issue in its entirety.

The HEPAD is based on a fundamental misunderstanding of Issue 34. The HEPAD says (at 27), “it is unreasonable to require Level 3 [to] indemnify Ameritech *for acts of others*. The fact that a *customer of Level 3* causes harm to the OSS of Ameritech is not the responsibility of Level 3. It is the equivalent of asking Level 3 to vouch for the good conduct and behavior of *all of its subscribers*.” (Emphasis added.) The language that is the subject of Issue 34, however, would not require Level 3 to indemnify Ameritech against loss caused by Level 3’s customers or other third persons for whom Level 3 cannot reasonably be held accountable. Rather, it would require Level 3 to indemnify Ameritech against loss caused by Level 3’s *employees*.

For example, disputed language in section 3.4 of the Appendix OSS-RESALE provides, “[Level 3] agrees to indemnify and hold [Ameritech Illinois] harmless against any claim made by an End User of [Level 3] or other third parties against [Ameritech Illinois] *caused by or related to [Level 3’s] use of any [Ameritech Illinois] OSS.*” (Emphasis added.) What that sentence is saying is that if a Level 3 customer (or other third party) brings a claim against Ameritech Illinois as a result of Level 3’s use of Ameritech Illinois’ OSS, Level 3 will indemnify Ameritech Illinois with respect to that claim. This is perfectly reasonable (and commercially routine) *and*, contrary to the HEPAD, it does not have to do with a situation where injury is caused by a Level 3 customer or other person outside Level 3’s control; rather, it has to do with a situation where injury is caused *to* a Level 3 customer (or other third party) *by* Level 3’s own use of Ameritech’s OSS.

The same holds for the disputed language in sections 3.2.1 and 3.2.2 of the same Appendix: like section 3.4, they appropriately require Level 3 to indemnify Ameritech Illinois

against abuses of Ameritech Illinois' OSS that result from Level 3's (not a Level 3 customer's) fault.

CONCLUSION

Ameritech Illinois respectfully urges the Commission to adopt the HEPAD with the modifications described above and shown in the Attachment to this brief.

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Respectfully submitted,

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