Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to establish an Interconnection Agreement with the Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri	)	Exhibit No. _____ Issue: _____ Witness: William P. Hunt Type of Exhibit: Direct Testimony Sponsoring Party: Level 3 Communications Case No. TO-2005-_____ Date: December 13, 2004

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

CASE NO. TO-2005-_____

DIRECT TESTIMONY

OF

WILLIAM P. HUNT III

ON BEHALF OF LEVEL 3 COMMUNICATIONS, LLC

December 13, 2004

TABLE OF CONTENTS

I. INTRODUCTION 3

II. PURPOSE OF TESTIMONY 4

III. BACKGROUND ON LEVEL 3 5

IV. MARKETPLACE FOR VOIP SERVICES 17

V. OVERVIEW OF OTHER PROCEEDINGS 24

VI. BURDEN OF PROOF AND THE PUBLIC INTEREST TEST 32

VI. CONTRACT ISSUES 35
ISSUE 1 and 5: USE OF INTERCONNECTION TRUNKS FOR ALL TRAFFIC 35
ISSUES 2: TRANSIT TRAFFIC 46
ISSUE 4: UNBUNDLED NETWORK ELEMENTS 52
ISSUE 6: INTERCARRIER (RECIPROCAL) COMPENSATION 57

I. INTRODUCTION

Q. PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS FOR THE RECORD.

A. My name is William P. Hunt, III. I am Vice President of Public Policy for Level 3 Communications, LLC ("Level 3"). My business address is 1025 Eldorado Boulevard, Broomfield, CO, 80021.

Q. PLEASE DESCRIBE YOUR RESPONSIBILITIES FOR LEVEL 3.

A. As Vice President of Public Policy, I am responsible for developing, implementing and coordinating Level 3's regulatory policy and governmental affairs activities in North America and Europe. I am also responsible for ensuring the company's regulatory compliance with state and federal regulations, and managing the company's interconnection services.

Q. PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE.

A. I received a Bachelor of Journalism from the University of Missouri in 1984. I received my Juris Doctor from Western New England College School of Law in 1991. I joined Level 3 as regulatory counsel for North America in February 1999 and was promoted to Vice President in January, 2000. In 2002, I was given responsibility for Level 3's regulatory operations in Europe and Asia as well.

Prior to joining Level 3, I was at MCI Communications ("MCI") for almost five years. I joined MCI's Office of General Counsel in 1994 as a commercial litigator. In March of 1996, I joined MCI's state regulatory group in Denver, Colorado, where I was responsible for securing state certifications in the western United States, supporting arbitrations under the Communications Act of 1934, as amended ("Act"), and prosecuting complaints against US WEST Communications, Inc. ("US WEST") in Washington and Minnesota.

Q. HAVE YOU TESTIFIED BEFORE THIS COMMISSION?

A. Yes. A complete list of where I have testified is attached as Exhibit ____.

II. PURPOSE OF TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. My testimony will provide information on Level 3, its business operations and explain how Level 3 provides services to its customers. In addition, I will provide the Commission with the policy foundation and factual support for Level 3's positions.

Q. WOULD YOU PROVIDE AN OVERVIEW OF THE CASE BEFORE THE COMMISSION?

A. Yes. As the Commission is aware there has been a lot of attention and discussion about VoIP. The good news is that this Commission doesn't need to solve all the broader social policy issues in this proceeding. Instead, all of us – the Commission, Level 3 and SBC - need to focus on the simple rules for interconnecting networks and the exchange of traffic. To maintain this focus, Level 3 will save many of the legal citations for its brief and closing comments.

There are a number of issues raised by SBC that the Commission should not consider at this time due to a lack of jurisdiction or because pending proceedings before the Federal Communications Commission ("FCC") will soon render any decision moot. For example, many VoIP issues are not properly before the Commission. However, because SBC has raised them, Level 3 must rebut them in order to maintain its rights under existing law.

III. BACKGROUND ON LEVEL 3

Q. CAN YOU PLEASE DESCRIBE LEVEL 3?

A. Launched in 1997, Level 3 is an international communications and information services company and is headquartered in Broomfield, Colorado. The company operates one of the largest, most modern communications and Internet backbones in the world.

Level 3 is one of the largest providers of wholesale dial-up services to ISPs in North America and is the primary provider of Internet connectivity for millions of broadband subscribers through its cable and DSL partners. Level 3's customer base includes the:

- world's 10 largest telephone companies,
- 10 largest carriers in Europe
- four Regional Bell Operating Companies in the United States
- 10 largest Internet Service Providers which combined serve more than 60 million online users
- six largest cable companies in the United States
- international wireless companies which combined have more than 260 million subscribers, and
- Satellite companies that deliver TV programming to almost 20 million subscribers in the United States.

Q. WHAT TYPE OF SERVICE DOES LEVEL 3 OFFER?

A. The Company offers a wide range of communications services over its approximately 23,000 miles broadband fiber optic network including Internet Protocol Services, broadband transport, collocation, our patented Softswitch-based managed modem and voice services. Those services include:

- Wholesale Internet Access Services,
- Managed modem dial-up services,
- Broadband transport,
- IP-centric voice services,
- Private packet-switched services,
- DSL aggregation,
- Collocation,
- Metropolitan and intercity dark fiber;
- Managed services that include international and domestic dedicated Internet Access,
- Remote dialup access,
- Managed Internet Security and
- IP Virtual Private Networks.

Q. YOU SAID THAT MANY CONSUMERS DO NOT REALIZE THAT THEY ARE USING LEVEL 3's SERVICES. CAN YOU ELABORATE?

A. Since its inception, Level 3 has operated in the wholesale space. We focus on what we do well: technology and network operations. As a result, many other companies use Level 3's services as building blocks to reach their customers. Since we are one of the three largest backbone operators in the world and our dial-up internet access platform reaches 90 percent of the US population, there's a one in three chance that an customer accessing the Internet via dial-up connections reach the Internet via Level 3's network. In addition, many interexchange carriers ("IXCs") and wireless companies use Level 3's network to provide seamless connectivity for their voice communication. Just to give the

Commission an idea of the demand for Level 3's dial up services the Company set a record for handling 1,000,000 simultaneous calls which roughly equals the entire population of St. Louis County dialing into the internet at the same time.

Q. DOES LEVEL 3 COMPETE IN THE RETAIL TELECOMMUNICATIONS MARKET?

A. Level 3 does not compete directly for retail end users in the business or residential space. Instead our products and services are designed to empower other providers by using our state of the art IP network to create their retail product offerings.

Q. CAN YOU PLEASE DESCRIBE LEVEL 3's NETWORK?

A. Yes. Completed in 2001, the Level 3 network is one of the world's newest and most advanced telecommunications platforms. The network contains four basic components: The intercity network; local gateways or synergy sites that contain collocation space; intracity networks; and transoceanic capacity. The network was built to be continuously upgradeable and fully optimized for Internet Protocol technology. A map of Level 3's global network is attached as Exhibit _____.

The intercity network spans 23,000 route miles. This includes 19,400 miles in North America and 3,600 miles in Europe. All but 500 miles of the network is lit. This network is made up of 12 conduits in North America and six to 12 conduits in Europe. The additional conduits allow Level 3 to deploy new generations of optical fiber and equipment quickly and economically. We believe that the ability to upgrade the network is critical to providing services in an era of rapid technological change. The current fiber capacity in the intercity network is the equivalent of an OC-192 which provides the capacity of 129,024 simultaneous DS-0 communications.

The intercity network connects to the company's intracity networks. Level 3 has 97 metro markets on its intercity network. That includes 77 markets in North America and 20 in Europe. There are 73 gateways with 63 in North America and 10 in Europe. The company maintains local fiber networks in 27 North American cities and nine in Europe. A list of the local markets is attached as Exhibit _____.

Finally, Level 3 connects its North American and European networks using two transoceanic fiber optic cable systems. The first, commonly known as Yellow, was commissioned and built by Level 3 within 15 months. It was the first submarine cable built by a carrier on its own. Level 3 operates two fiber pairs on that network. In order to provide network redundancy and additional capacity, Level 3 operates a second system over the Atlantic Crossing 1 facilities

Q. YOU MENTIONED LEVEL 3's GATEWAYS. CAN YOU ELABORATE?

A. Yes. Level 3's gateways are in effect our advanced data centers where Level 3 places its own communications equipment and space where our customers collocate their own optical electronics and technical gear. Level 3 operates these centers on a carrier-neutral basis. In addition to providing services on our network, we also offer connectivity to an average of eight telecommunications service providers. Level 3 believes that these neutral locations represent a fundamental shift away from proprietary interconnection requirements to open platforms and interconnection standards that are otherwise closed within the legacy public switched telephone network.

Q. WHAT DID THE SMITHSONIAN INSTITUTION SAY ABOUT THE LEVEL 3 NETWORK?

A. The Smithsonian Institution has recognized the Level 3 network as an important component of the ongoing evolution in communications and information technology. In April 2000, Level 3 was cited as a Computerworld Laureate for its historic achievement in creating a new kind of network infrastructure. The Smithsonian noted that Level 3 is changing communications at a fundamental level and "helping to stimulate the biggest change in communications technology in 100 years."

Q. WHY IS IT IMPORTANT TO UNDERSTAND LEVEL 3's NETWORK WITHIN THE CONTEXT OF THIS PROCEEDING?

A. It is important in this case to understand Level 3's network and the underlying technology because it represents as the Smithsonian Institution said, "the biggest change in communications technology in 100 years". As a result of this evolution in network operations and technology, the industry can provide voice communications in ways and over platforms never considered when the current regulatory regime was established. That has never been truer than with Voice Over IP. Because of technology, VoIP will lead the evolution of not only how we communicate but how we regulate communications, if at all. In short, VoIP challenges every single precept upon which our current telecommunications market and its regulatory model are based.

Q. CAN YOU PLEASE ELABORATE ON THOSE DIFFERENCES?

A. Yes. There are a number of areas but let me focus on two policy issues that are associated with the network. For any detailed discussion of the network, you'll have to talk with Mr. Wilson. For a detailed discussion of economics, you'll have to talk with Mr. Gates.

The first has to do with how we recover network costs. Historically, capacity in a legacy network was allocated on an end to end basis. By that, I mean a call from Denver

to New York entailed connecting a series of circuits in order for the end users to communicate. That capacity could only be used by the two parties on each end of the call until the session was terminated. As a result, capacity within the network was treated as a scarce resource. Policymakers then adopted a regime that recovered costs based on distinctions such as time and distance.

In a network based on Internet Protocol technology, time and distance no longer matter because routing decisions are based on the most efficient path. Unlike the call described above which required a dedicated path for the parties to communicate, an IP network does not tie up network facilities in the same way because the voice transmission is converted to packets, assigned headers and then sent out on the network in the most efficient manner. This means that each packet may take a separate path based on traffic within the network. In a call from Denver to New York, half the packets may go through Dallas and the other half through Detroit before reaching the termination point on time and in order.

Traditionally, network costs were recovered by an elaborate regime that measured the time, distance, and jurisdiction of a call. In the IP network, the focus is more on maximizing the capacity within the network

As a result of the foregoing dynamics, a complex set of rules surrounding revenue allocation and economic subsidization of the operators of the PSTN have been developed. And in most cases, the underlying purpose of the rule was not to establish the most efficient regime, but to constrain the economic power of the dominant provider and advance social policy goals such as universal access.

Q. DOES THAT MEAN THAT IN ORDER TO SUCCESSFULLY IMPLEMENT NEW TECHNOLOGIES AND SERVICES LIKE VOIP THAT WE'LL REQUIRE A REGULATORY REVOLUTION?

A. No, on the contrary. This proceeding is not about a revolution, but an evolution in how we communicate – from a closed network to an open one. Since Alexander Graham Bell first summoned Mr. Watson, the telecommunications industry has been perpetually driven by changes in technology. Those advances have allowed us to upgrade the quality of the service, to provide enhanced functionalities and to improve the economics of a call.

Q. CAN YOU PROVIDE SOME EXAMPLES OF THE EVOLUTION OF THE TELECOMMUNICATIONS INDUSTRY?

A. Yes. In doing so, I'd like to talk briefly about developments in network switching, and wireless technology. Each offers helpful insights and history on how regulators and the industry have managed past technological transformations and can manage the evolution of the telecommunication industry to an IP world that embraces applications such as VoIP as well as the undiscovered application.

Q. CAN YOU PLEASE DISCUSS THE EVOLUTION OF NETWORK SWITCHING?

A. Yes. Originally, phone companies needed operators stationed at switchboards to complete a call. As technology improved, the human switch was replaced by machines. Those original switches were enormous pieces of equipment and would fill a number of floors in the Bell Company central offices. Eventually those switches gave way to smaller, more efficient digital switches taking up a portion of the floor space. With each evolutionary improvement, the capacity and functionality offered by the switch increased while the costs for that technology decreased. That evolution continues today through the

introduction of "soft switches" like those deployed exclusively in Level 3's network. There are no circuit switches in Level 3's network.

Q. CAN YOU DESCRIBE A SOFT SWITCH?

A. I can provide a brief description of a soft switch. You'll have to talk with Mr. Wilson to get an in depth knowledge of soft switching technology. The phrase "soft switch" represents a computing platform that runs software applications that provide all the intelligence and functionality required to originate and terminate a communication. A softswitch adopts an open architecture as to its computing platform. Speaking at a high level, those functionalities may not necessarily reside in a single device or location but instead may be dispersed across a wide, geographic area. For example, in the Level 3 network, we provide services using soft switches located in eight cities with signaling and medial controllers operated out of three city pairs.

Q. WHAT ANALOGIES CAN THIS COMMISSION AND THE INDUSTRY DRAW FROM THE EVOLUTION OF SWITCHING?

A. Level 3 believes that the technological evolution in switching is a paradigm for how networks evolve. Until recently, switching functions and network intelligence were centrally controlled and planned. End users could only receive the services that the central architects of the network would allow. Deployment of those innovations was often slowed by the regulatory regime that oversaw the economic regulation of the dominant provider.

For the past few years, Level 3 has been working closely with a number of companies who want to bring innovative VoIP services to the different market segments. The fundamental concept for each of these companies is that they expect control of their

products to move out of a centrally planned network to them. Level 3 does not dictate the product set to the customer but instead offers building blocks which allows for greater customization. The result has been more innovative services, enhanced functionalities and a new economic model that includes flat rate bundles for all local and North American calls. I'll talk more later about these services and what Level 3 provides to its customers and how they fit into the context of this proceeding. But for now, I don't think it's a reach to say that we are on the brink of a dramatic evolution in what communication services look like. We should use this proceeding to promote their evolution.

Q. CAN YOU DESCRIBE HOW WIRELESS TECHNOLOGY HAS TRANSFORMED THE TELECOMMUNICATIONS INDUSTRY?

A. Until wireless technology took hold in the 1980s, it was considered a universal law of telecommunications that in order to communicate with someone through the public switched telephone network, each end user had to have a handset that was connected through a combination of wires. Someone making a call had to locate one of those handsets whether it was a private residential phone, in a business lobby or a payphone. Wireless communications were once limited to the fans of Dick Tracy, Star Trek and science fiction writers. Everyone knew that if you cut the wires, you could not communicate. How many movies and television shows have you seen where the ominous gloved hand of an intruder either cut the phone wires or pulled them from the wall? Now, an end-user has to do nothing more that reach into their pocket, backpack or briefcase to find their wireless phone and make a phone call. So at a threshold level, the most fundamental change has been to free end users from the physical connection to a network and provide mobility.

Q. HOW ELSE HAS THE TELECOMMUNICATIONS INDUSTRY EVOLVED THROUGH THE DEPLOYMENT OF WIRELESS?

A. Wireless has had a positive impact on the industry. Unlike the public switched telephone network where improvements in the quality of service offered by the dominant provider were mandated through regulation, quality of service in the wireless world has improved as the result of competition. At first, the phones were large devices and the quality of service poor. Today, while it still does not reach the quality of the public switched telephone network, wireless companies have dramatically improved their service in order to win and retain customers. And now with full number portability, we are seeing more flat rated options for consumers that include all local and national calls for one price. The competition to win customers has spread into the handset market where the phones have evolved from clunky devices the size of a brick to small computers offering Internet access, text messaging, and digital photos and in some parts of the World, a tool for conducting financial transactions.

In addition to changes in customers' calling habits and the quality of service, wireless has shown that consumers will accept less than the traditional feature set associated with wireline service including full access to emergency services. Access to emergency services has continually evolved from the advent of wireless calls from no access to some form of operator access to now deployment of emergency services based on the location of the calling party.

Q. HOW IS THE EXPERIENCE OF THE WIRELESS INDUSTRY HELPFUL IN THE ISSUES BEFORE THIS COMMISSION?

A. The industry's experience with the rollout of wireless is illustrative in a number of ways. While I realize the regulatory regime covering wireless is different from other traditional

wireline services, I think the development of wireless products and services provides a helpful roadmap.

First, wireless has introduced consumers to a range of new service providers with names ranging from Cricket to T-Mobile to the traditional name brands of AT&T and Sprint. When you look in the VoIP arena, we see new companies like Vonage, 8x8 and Lingo as well as the traditional name brands of AT&T, SBC and Sprint. This expansion of providers shows that consumers are ready to choose their communication companies based on their own personal and economic needs which is similar to how they buy toothpaste or any other commodity. In most market segments, geography no longer dictates who your communications provider will be.

Secondly, wireless has introduced the concept of mobility and the expectation that you will not receive the same functionality as you do with a land line network. In the case of VoIP, we see formerly separate concepts of a physical connection and mobility coming together. Now, consumers can move their communication devices anywhere there is a broadband connection and receive calls based on the phone number assigned at the original location. In a broadband setting, the number you dialed in Denver might be answered in London. In our legacy networks, if you moved the phone from your house in Denver to Washington, DC, you would have to use a new DC number to make calls.

Third, wireless has shown that carriers providing competing communication platforms can and must interconnect their networks for the exchange of traffic. The value of both the wireless networks and the public switched telephone network would be greatly diminished if those parties could not exchange traffic. We are facing the same situation with VoIP. If the existing rules are not enforced for interconnecting the IP world

with all other communications platforms, we diminish the value of all communications platform and will only exacerbate the digital divide. At its most fundamental level, that is exactly what this proceeding is about.

IV. MARKETPLACE FOR VOIP SERVICES

Q. CAN YOU PLEASE PROVIDE A BRIEF DESCRIPTION OF THE MARKETPLACE FOR VOIP SERVICES?

A. In the past two years, public interest in and acceptance of VoIP has increased steadily. VoIP has moved from a hobby for Internet enthusiasts to a mainstream product offered to residential and business customers. Enhanced service providers, cable companies, the RBOCs and other carriers are all entering the burgeoning VoIP market. During the period when I was preparing this testimony, AT&T announced that it would offer its residential VoIP service through 628 retail outlets of Best Buy as well as online. [1] In addition, AT&T has also announced that it will collaborate with cable companies to market its internet telephony services. [2]

Q. WHAT TYPE OF PRICING PLANS ARE VOIP PROVIDER OFFERING IN THE RESIDENTIAL MARKETPLACE?

A. Pricing for residential VoIP services is extremely competitive and offers the best shot at bringing competition to the residential market. Most VoIP providers are offering flat rated calling programs. For example, Vonage offers the following residential calling plans:[3]

[1] Best Buy to sell AT&T's internet phone service, cnet news.com, Aug. 23, 2004

[2] *Id*.

[3] See: www.vonage.com, prices posted as of December 13, 2004.

- Basic 500: $14.99 for 500 basic minutes anywhere in the U.S. or Canada,
- Unlimited Local: $24.99, an unlimited local and regional calling plan that includes 500 long distance minutes; and
- Premium Unlimited: $24.99 for calls anywhere in the U.S. or Canada.

Another provider, Packet 8 offers the following residential calling plans:[4]

- Freedom Unlimited: $19.95 for unlimited PSTN and Packet8 IP minutes. Additional rates apply to International calls.
- Freedom International: $19.95 for up to 1,000 PSTN minutes and unlimited IP minutes. Additional rates apply to International calls.
- Freedom Unlimited Videophone Service: $29.95 a month for unlimited PSTN and IP minutes.

Another provider, Lingo offers the following residential calling plans:[5]

- Basic: $14.95 for 500 minutes in the U.S., Canada and Western Europe;
- Unlimited: $19.95 for unlimited calls to anyone in the United States, Canada and Western Europe.
- Unlimited International: $79.95 for unlimited minutes each month to anyone in the U.S., Canada, and many International countries.

And finally, AT&T's CallVantage Service offers unlimited local and long distance calling, plus unlimited calling to Canada for an introductory offer of $0 for the first month, and then $29.99 for each month.[6]

[4] See: www.packet8.net, prices as of December 13, 2004.

[5] See: www.lingo.com, prices as of December 13, 2004.

[6] See: www.usa.att.com/callvantage/ prices as of December 13, 2004.

Q. IF OTHER ENTITIES HAVE THE RELATIONSHIP WITH THE END USER, HOW DOES LEVEL 3 BECOME INVOLVED IN THE CALL FLOW?

A. At its most basic level, Level 3 sees its role as providing the building blocks its customers need to provide service to their end users. The range of services Level 3 offers are designed to bridge the gap between IP networks and the PSTN and can range from discrete components to a turnkey solution. For example, because an enhanced service provider is not entitled to interconnection under the Telecommunications Act of 1996, it might turn to Level 3 to provide local telecommunications services including the exchange of traffic with the networks of other carriers.

Q. CAN YOU PROVIDE AN EXAMPLE OF A CALL FLOW THAT WOULD NOT REQUIRE INTERCONNECTION WITH THE PSTN?

A. Sure. Let's assume for a moment that ESPCO decides that it wants to offer a voice application. ESPCO could create a voice application that never traverses the public switched telephone network. This is often referred to as a peer to peer system. If it did that, its customers would reach each other by contacting an IP address, an email address or some other addressing mechanism instituted by ESPCO. In that instance, the voice peers on ESPCO's IP network and would only be able to communicate with other ESPCO peers. This is similar to the peer to peer services offered by Pulver.com which the FCC found earlier this year to be an information service and not subject to Title II regulation. Skype is another application service provider offering an internet based voice service. Skype's website indicates that the company had downloaded its free software to 21 million people worldwide.[7]

[7] See: www.skype.com, as of Aug. 26, 2004.

Q. BUT IN THE EXAMPLE YOU JUST USED, THE VOICE PEERS ON ESPCO's NETWORK AND CAN'T CALL OUTSIDE THEIR NETWORK?

A. That's correct. If ESPCO wishes to exchange voice applications with the public switched telephone network, it could either become a retail customer of a local exchange carrier or it could decide that it wants to become a certified telecommunications carrier which will give it interconnection rights under the Telecommunications Act of 1996. However, many companies like ESPCO don't see their core competency as managing and operating a communications network so they turn to companies like Level 3 to bridge the IP and PSTN worlds.

Q. HOW DOES LEVEL 3 BRIDGE THE GAP BETWEEN THE IP DOMAIN AND THE PSTN?

A. I think it might help if we walk through a simple call flow. This call flow represents one of the many ways a customer designed voice application can be offered by Level 3. Mr. Wilson can provide greater technical detail.

Since ESPCO has decided it does not need to become a certificated carrier, it would come to Level 3 to purchase local direct inward dialing and direct outward dialing capabilities. As part of that service, Level 3 provides ESPCO with phone numbers. ESPCO then assigns those numbers to its end user customers. Let's assume that ESPCO markets it service through a retail store where Vicky VoIP purchases a box containing either ESPCO's special SIP phone or an adapter for her existing home phone. In both cases, the SIP phone or regular phone with adapter will be plugged into Vicky's broadband connection. After setting up the equipment and activating her account, Vicky VoIP calls her husband, Dan, who is a regulatory lawyer for the local dominant telephone company.

Vicky will pick up the phone and dial 555.555.1212 to reach her husband at the office (for purposes of this calling pattern, I am assuming that 555 is an active area code and that 10-digit routing is in place for all calls.) Vicky's speech patterns will originate as packets and be routed across the broadband connection where it will be routed through the Internet to an IP address on the Level 3 network.

At the point the call reaches the Level 3 network, Level 3 recognizes 555.555.1212 as a phone number assigned to the local dominant telephone company. Level 3 then routes the call to the local gateway where the call is converted from packets into a standard compatible with the terminating network known as TDM or time division multiplexing. At that point, Level 3 routes the call over its local interconnection trunks and hands it off to the local phone company which terminates the call to Dan in TDM. In this call flow scenario, the voice media stream undergoes a net protocol conversion. Level 3 pays the local phone company the termination rate for local calls.

If Dan wants to call Vicky VoIP, the call then goes in the opposite direction from the local phone company's network across the local interconnection trunks to Level 3's network. At that point, Level 3 converts the TDM signal to packets. As the traffic flows in each direction, Level 3 incurs the expense of converting the protocol of the media stream in order to exchange traffic with the local phone company. After converting the call to packets, Level 3 assigns the appropriate headers and directs the traffic to an IP address associated with the telephone number assigned to Vicky VoIP. The media stream leaves the Level 3 network, traverses the internet and is terminated to Vicky VoIP. And just like the first call, the voice application has undergone a net protocol conversion. In

this call scenario, the dominant local telephone company pays Level 3 the appropriate rate for termination of local calls.

Q. FROM A POLICY PERSPECTIVE, HOW SHOULD THIS COMMISSION APPROACH THE ISSUES SURROUNDING VoIP?

A. As has been shown in most, if not all technology arenas, an open architecture such as IP-enabled services encourages innovation, economic growth and customer choice. There is no disagreement that VoIP has become the catalyst for an overdue debate on regulatory reform that touches everything from what constitutes a basic service to how we will provide universal service support. Since many of the issues are playing out in other proceedings, the Commission should focus its resources on ensuring that the existing interconnection rules are not used in a manner that thwarts the introduction of VoIP services.

Q. MUST THIS COMMISSION ADDRESS ALL OF THE BROADER POLICY ISSUES IN THIS PROCEEDING?

A. No. As discussed previously, this Commission only needs to address the basic economic and network architecture issues that address how Level 3 and SBC will exchange traffic so that we can allow VoIP traffic to flow across all networks.

Q. WHY SHOULDN'T THIS COMMISSION CONSIDER THE BROADER POLICIES IN THIS PROCEEDING?

A. From a policy perspective, it is not wise to address broader social policy goals that impact an entire industry in an arbitration proceeding involving two carriers. Instead, those issues need to be addressed in proceedings that provide an opportunity for comment and involvement from a wide range of interested parties. This is especially true if the proceeding will result in the fundamental reform of existing regulatory rules and

procedures. Without the benefit of experience and comprehensive debate, to act hastily will have profound and unintended consequences.

Q. BUT WON'T THIS COMMISSION HAVE TO ADOPT NEW RULES TO RESOLVE THE ISSUES BEFORE IT ESPECIALLY NETWORK ARCHITECTURE AND INTERCARRIER COMPENSATION?

A. No. As we will discuss later and address in our briefs, the Commission already has all the tools it needs to resolve the issues before it. In fact, because this proceeding represents an evolution in the telecommunications industry, all parties are better off using the existing rules and regulations to manage the transition.

Q. SHOULD THIS COMMISSION BE CONCERNED THAT A DECISION IN THIS PROCEEDING WILL UNDERMINE THE EXISTING REGULATORY REGIME?

A. No. On the contrary, Level 3 believes that by resolving the issues in this proceeding the Commission will replace regulatory uncertainty with a stable environment for the broader introduction of new services such as VoIP in a manner that will benefit SBC and Level 3 – and most importantly the citizens and businesses of Missouri.

I think it is important to remember that the evolution of the telecommunications industry and the acceptance of VoIP will take time. There will not be a flash cut to VoIP but a market driven evolution. That means the Commission will have time to make any necessary adjustments to the regulatory regime and to do so with input from the broader industry. Industry players will have a chance to retool and adjust their business plans as the market requires. Level 3 believes that making those adjustments based on practical experience and not conjecture about "worst case scenarios" will provide a better basis to create the necessary regulatory climate.

V. OVERVIEW OF OTHER PROCEEDINGS

Q. CAN YOU PROVIDE AN OVERVIEW OF THE OTHER PROCEEDINGS THAT MAY IMPACT ISSUES INTRODUCED IN THIS ARBITRATION?

A. Yes. There are four proceedings at the FCC that address issues presented in this proceeding. Having already explained Level 3's policy view of how this Commission's jurisdiction is impacted by those proceedings, I'll provide a brief summary of the policy issues raised in the following proceedings:

- *In the Matter of Level 3 Communications LLC's Petition for Forbearance Under 47 U.S.C.§ 160(c) and Section 1.53 of the Commission's Rules from Enforcement of Section 251(g), Rule 51.701(b)(1) and Rule 69.5(b).* ("Level 3 Forbearance Petition").[8]
- *In the Matter of IP Enabled Services* ("IP-Enabled Services Proceeding")[9],
- *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and In the Matter of Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*[10] (collectively "ISP Remand Order").
- *Developing a Unified Intercarrier Compensation Regime, ("Intercarrier Compensation NPRM")*[11]

Q. PLEASE DESCRIBE THE LEVEL 3 FORBEARANCE PETITION?

A. In the Level 3 Forbearance Petition, the Company has asked the FCC to reaffirm that reciprocal compensation arrangements continue to apply to the exchange of IP enabled traffic, specifically VoIP traffic. Historically, VoIP traffic, generally defined as that which undergoes a protocol conversion, has been exempt from interstate or intrastate

[8] WC Docket 03-266, *Level 3, LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, filed Dec. 23, 2003. ("*Level 3 Forbearance Petition*").

[9] WC Docket 04-36, *In the matter of IP Enabled Services*, Notice of Proposed Rulemaking, released March 10, 2004. ("*IP Enabled Services Docket*").

[10] CC Docket No. 99-68 and CC Docket No. 99-98, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 (¶ 32) (rel. April 27, 2001) ("*ISP Remand Order*").

[11] CC Docket No. 01-92, In the Matter of Developing a Unified Intercarrier Compensation Regime Notice of Proposed Rulemaking, FCC 01-132 ¶¶ 72,112 (rel. April 27, 2001)("*Intercarrier Compensation NPRM*")

access charges under the ESP exemption. Despite this long standing exemption, some local exchange carriers have sought to unilaterally impose access charges on VoIP traffic. SBC is one of those carriers. Level 3 filed its Petition in order to eliminate any confusion concerning the regulatory and economic treatment of VoIP traffic under current FCC rules so that all VoIP providers can devote resources to deploying their products instead of engaging in protracted, legal and regulatory disputes.

Q. WHAT TYPE OF TRAFFIC IS COVERED BY THE PETITION?

A. The Petition basically covers VoIP traffic where one end point is on the public switched telephone network and the other end point is on an IP network or the Internet. More specifically, VoIP traffic is traffic that:

a. Originates on the PSTN within the same LATA of the point of interconnection between the Local Exchange Carrier and the interconnected telecommunications carrier, and is passed to an end-user from an IP network provider in an IP format (i.e., "Phone to computer"); or
b. Terminates over the PSTN in a circuit-switched format after having been transmitted from an end-user to an IP provider in IP format, and exchanged between the telecommunications carrier serving an IP service provider and the terminating LEC at a point of interconnection within the same LATA as the called party (i.e., "Computer to phone");

In addition, incidental traffic that originates and terminates on the PSTN as the result of an enhanced functionality, would be exempt from access charges. An example of such a call would be one that originates on the PSTN and terminates on an IP network. In such an instance, the party receiving the call may have established a "find me follow me" service that calls to specified locations to reach the called party. In the event that sort of call terminated back on the PSTN, that is the result of the enhanced functionality of the VoIP service and does not represent a traditional PSTN to PSTN call.

Q. DOES THE PETITION EXEMPT TRADITIONAL PHONE TO PHONE TRAFFIC FROM ACCESS CHARGES?

A. No it does not. In April, the FCC ruled in a proceeding brought by AT&T that traditional phone to phone traffic defined as that traffic that does not undergo a net protocol conversion is subject to access charges ("AT&T Petition").[12]

Q. IS THERE A DISPUTE BETWEEN SBC AND LEVEL 3 OVER THE APPROPRIATE COMPENSATION FOR TRAFFIC COVERED IN THE AT&T PETITION?

A. No. Level 3's proposed agreement reflects this decision.

Q. WHAT IS THE PROCEDURAL STATUS OF THE LEVEL 3 PETITION?

A. The FCC has granted itself the three-month extension allowed under the law. A decision is now due by March 22, 2005. As required by law, if the FCC takes no action by March 22, the Petition is deemed granted.

Q. WHY IS THE LEVEL 3 FORBEARANCE PETITION RELEVANT TO THIS PROCEEDING?

A. The Petition is relevant in a number of ways. First, two of the core issues in this proceeding are before the FCC in the Level 3 Petition. The first is the appropriate compensation for VoIP traffic. The second is the ability to exchange VoIP traffic over local interconnection trunks. Despite the FCC's long-standing ESP exemption for VoIP traffic, SBC is asking this Commission to pre-empt the FCC's rule which is something this Commission should not and cannot do.

Q. HOW SHOULD THIS COMMISSION RESOLVE THE ISSUES RAISED BY THE LEVEL 3 FORBEARANCE PETITION?

[12] In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges. WC Docket No. 02-361 (April 2004.)

A. As will be discussed in greater detail later in my testimony and then in our briefs, Level 3 believes the Commission has two options with respect to those issues covered by Level 3's Forbearance Petition. The first is to adopt Level 3's contract language which implements the existing FCC ESP Exemption. The second option is to defer those issues until the FCC acts on the Level 3 Forbearance Petition. If the Commission decided to defer any action, it should order the parties to exchange this small amount of traffic on the local interconnection facilities until such time as the FCC acts which will be no later than March 23, 2005. At that time, the parties can invoke the change of law provision in the contract to negotiate the necessary changes. Given the impending statutory deadlines that will drive resolution of the Forbearance Petition and the issues in this section of the petition, this Commission should not take any steps that would impair the rollout of VoIP services or force the parties to deploy unnecessary network facilities until the FCC acts. To do otherwise would be to not only disadvantage Level 3 and the CLEC community at large, but also the citizens and businesses of the state that would have their availability to the richness of VoIP services curtailed.

Q. PLEASE DESCRIBE THE FCC's IP-ENABLED SERVICES DOCKET?

A. In its IP-Enabled Services Docket, the FCC is undertaking a holistic review of the regulatory regime that should apply to IP-Enabled Services. That review ranges from whether regulation is necessary and jurisdictional matters to public safety concerns, intercarrier compensation and universal service

Q. HOW IS THE IP-ENABLED SERVICES DOCKET RELEVANT TO THIS PROCEEDING?

A. The IP-Enabled Services Docket is relevant because it will address many of the broader policy issues that I expect SBC will raise in this proceeding to impose inappropriate economic regulation and network architecture on VoIP services. As VoIP continues to gain acceptance, those parties who are opposed to its deployment have argued that VoIP should be held up because of concerns over access to emergency services or a fear that the universal service program will come crashing down. In addition, they have argued that legacy economic regulation should apply to VoIP. While I do not think that we can cast a blind eye to the social policy questions raised by VoIP, I do not believe that they should become the regulatory shield that holds back the benefits of VoIP from the citizens and businesses in this state. The FCC started down the correct path when it wrote:

> Our aim in this proceeding is to facilitate the transition, relying wherever possible on competition and applying discrete regulatory requirements only where such requirements fulfill important policy objectives… we seek comment on whether there is a compelling rationale for applying traditional economic regulation to providers of IP-enabled services.[13]

Level 3 believes that this Commission should follow the same evolutionary path by imposing the existing rules to core interconnection obligations and intercarrier compensation. The broader policy impacts should be set aside for resolution in the IP-Enabled Services docket. Should that proceeding, or any subsequent state proceeding, require Level 3 and SBC to reform this agreement, the parties can do so through the appropriate change of law provisions in the agreement.

Q. HOW IS THE ISP-REMAND ORDER RELEVANT TO THIS PROCEEDING?

[13] IP Enabled Services Docket at ¶ 5.

A. The ISP Remand Order represents another area where the FCC is expected to act soon on an issue that is included in this proceeding. How the FCC acts in the next few months could change or alter any decision that comes from this arbitration. The FCC has been in a revolving door at the DC Circuit Court of Appeals with respect to its efforts to handle ISP-bound traffic. Recently, the FCC issued its *Vonage Order*[14] and the *Core Forbearance Order.*[15] I discuss both of these decisions below. However, both of these decisions by the FCC show that the FCC will be confirming the compensation arrangements for IP Enabled traffic, and ISP-Bound traffic shortly.

Q. FROM A POLICY PERSPECTIVE, WHAT DIRECTION SHOULD THIS COMMISSION TAKE FROM THE ISP REMAND?

A. From a policy perspective, the Commission should avoid any major changes in the current compensation regime for ISP bound traffic and should defer action until the FCC rules on the ISP Remand. In its response to the mandamus petition, the FCC said that action was imminent. While I will address this later in my testimony and in our briefs, a more prudent course of action in the event the FCC has not issued a decision, would be for this Commission to extend the existing intercarrier compensation regime for ISP bound traffic that is in place between Level 3 and SBC. The parties can then invoke the change of law provisions, if necessary, to reform the agreement to the ISP Remand Order.

Q. PLEASE DESCRIBE THE FCC'S INTERCARRIER COMPENSATION PROCEEDING.

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[14] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning Order of the Minnesota Public Utilities Commission*, FCC 04-267, Memorandum Opinion and Order (rel. Nov. 12, 2004) (hereafter referred to as the "*Vonage Order"*).

[15] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Dkt. 03-171, Order (rel. Oct. 18 2004) (*Core Forbearnace Order*).

A. In the *Intercarrier Compensation* proceeding, the FCC issued a Notice of Proposed Rulemaking to overhaul the existing intercarrier compensation regimes and replace them with a single, unified intercarrier compensation regime. In paragraph 115 of its Notice, the FCC identified the use of "virtual central office codes" as an issue to be resolved in this rulemaking. Thus, the issue of the proper intercarrier compensation for traffic using virtual central office codes ultimately will be addressed by the FCC.

Q. WHAT IS THE PROCEDURAL STATUS OF THE INTERCARRIER COMPENSATION PROCEEDING?

A. The FCC has received comments and reply comments, and numerous groups, including the Intercarrier Compensation Forum, have submitted comprehensive proposals to overhaul current intercarrier compensation mechanisms. The FCC is expected to release a further notice requesting comment on these and possibly other proposals by the end of this year.

Q. WHY IS THE INTERCARRIER COMPENSATION PROCEEDING RELEVANT TO THIS PROCEEDING?

A. The issue of intercarrier compensation for FX-like traffic (*i.e*., traffic to customers using virtual central office codes) is before the FCC. While this Commission has jurisdiction to arbitrate this issue, the parties will ultimately be required to amend the contract, if necessary, to conform to the FCC's ruling on this issue.

Q. HOW SHOULD THIS COMMISSION RESOLVE THE ISSUES RAISED BY THE INTERCARRIER COMPENSATION PROCEEDING WITH RESPECT TO VIRTUAL CENTRAL OFFICE CODES?

A. The Commission should follow the holding of the *Virginia Arbitration Order*[16] by the FCC's Wireline Competition Bureau. That Order determined that reciprocal compensation should apply to calls to virtual central office codes (*i.e.*, FX-like services) pending a FCC determination in the rulemaking proceeding.

Q. PLEASE SUMMARIZE HOW THESE ISSUES IMPACT THIS PROCEEDING?

A. The proceedings mentioned above address issues that are before this Commission in this proceeding. Two of those proceedings, the Level 3 Forbearance Petition and the ISP Remand cases, involve the proper application of federal rules for the exchange of VoIP and ISP-bound traffic. A third proceeding, the IP-Enabled Services Docket, will address the broader questions associated with the appropriate regulatory regime for those services. As a whole, those cases reflect a growing examination of how IP-enabled services and VoIP services specifically will be regulated and compensated. This Commission should decline SBC's invitation to make sweeping changes to the existing regulatory regime in the context of this contract arbitration and should instead adopt policies that maintain the status quo and allow for the parties to quickly implement the FCC's decisions.

VI. BURDEN OF PROOF AND THE PUBLIC INTEREST TEST

[16] *Petition of Worldcom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, CC Dkt. 00-218, Memorandum Opinion and Order, 17 FCC Rcd. 27,039 (2002) ("*Virginia Arbitration Order*").

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Q. FROM A POLICY PERSPECTIVE, WHO BEARS THE BURDEN OF PROOF IN THIS PROCEEDING WITH RESPECT TO A NEW TECHNOLOGY OR SERVICE SUCH AS SERVICES?

A. As a matter of law and policy, the burden of proof in opposing the introduction of VoIP rests with SBC.

Q. PLEASE EXPLAIN WHY SBC HAS THE BURDEN OF PROOF?

A. Recognizing that new technologies and services would continue to evolve in the communications industry, Congress expressly placed the burden on any party opposing the introduction of a new service or technology. Specifically, Section 7(a) of the Act provides that:

> It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.[17]

In addition, the FCC has interpreted Section 7 the following way:

> So important is this policy, Congress has enjoined that "[a]ny person or party (other than the [FCC]) who opposes a new technology or service ... shall have the burden to demonstrate that such proposal is inconsistent with the public interest." It has been our experience, in the nearly sixty years since the Communications Act was enacted, that accommodating new technology and service proposals serves these objectives.[18]

Q. HOW IS SECTION 7 RELEVANT TO THIS PROCEEDING?

A. One of the primary disputes in this arbitration is how SBC and Level 3 will exchange VoIP traffic. This issue includes both the type of interconnection facility needed and the compensation arrangement.

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[17] 47 U.S.C. § 157(a).

[18] *Rulemaking To Amend Part 1 And Part 21 of the Commission's Rules To Redesignate The 27.5--29.5 Ghz Frequency Band And To Establish Rules And Policies For Local Multipoint Distribution Service*, 9 FCC Rcd. 1394, Second Notice Of Proposed Rulemaking, ¶ 27 (1994).

Level 3 and SBC agree that VoIP services are Title I information services. Yet, despite clear FCC guidance that access charges do not apply to information service as a result of the ESP exemption, SBC argues for the application of access charges under Title II. SBC's position is that the Commission should impose a *new* obligation on these services because it would otherwise be inconsistent with the public interest to permit the offering of IP-enabled services. This type of argument falls squarely within the scope of Section 7.

Q. DO YOU RECOMMEND THAT THE COMMISSION APPLY SECTION 7 PRINCIPLES IN THIS CASE?

A. Yes. Consistent with Section 7, SBC should bear the burden of proving that exchanging IP-enabled services under the existing rules, with no access charges imposed, is inconsistent with the public interest. Specifically, SBC should be required to show, through cost studies, network models, and other appropriate evidence, that imposition of access charges on IP-enabled services is necessary to sustain universal service or necessary to serve the public interest.

Q. ARE YOU SUGGESTING THAT SBC SHOULD SUBMIT COST STUDIES IN THIS DOCKET?

A. No. Because even SBC agrees that IP-enabled services are interstate in nature, SBC should bear that burden of proof in a separate proceeding before the FCC, not this Commission.

Q. WHY SHOULDN'T THIS COMMISSION DETERMINE WHETHER SBC MEETS ITS BURDEN?

A. As a legal matter, Congress has assigned to the FCC, not state commissions, the jurisdiction to determine whether any new technology is in the public interest.[19]

[19] 47 U.S.C. § 157(b).

Moreover, as I've already explained, the federal "ESP exemption" supports Level 3's position in this arbitration and this Commission does not have jurisdiction to end that exemption.

As a policy matter, this Commission should let the FCC resolve this issue because it is already pending before the FCC in Level 3's Petition for Forbearance and the *IP-Enabled Services Rulemaking*. As SBC and Level 3 agree, it is difficult, if not impossible, to separate IP-enabled services into distinct intrastate and interstate components and most IP-enabled services are interstate in nature. Therefore, the FCC should adopt a uniform national policy concerning compensation for the exchange of IP-enabled services.

For these reasons, Level 3 requests that the Commission preserve the status quo and adopt Level 3's position on Issue 6.

Q. PLEASE SUMMARIZE THE IMPACT OF SECTION 7 ON THIS PROCEEDING?

A. By setting aside for the FCC any argument about whether the introduction of VoIP services is in the public interest, the parties in this proceeding can focus on the core issues of how we will connect our network and how much parties will pay each other to exchange traffic. By focusing its efforts in those important areas, this Commission can take the vital first steps to ensuring that VoIP traffic has an opportunity to get out of the starting blocks. And as we have already discussed, many of the broader "public interest" themes are already under consideration at the FCC in other proceedings.

VII. CONTRACT ISSUES

ISSUES 1 and 5: USE OF INTERCONNECTION TRUNKS FOR ALL TRAFFIC [20]

Q. PLEASE DESCRIBE THE PARTIES' DISPUTE.

A. As part of the physical transport facilities that carry communications, software routes the communications to ensure the voice application properly goes from point A to point B within the transport facility. This aggregation of routes within the physical facility is referred to as the "Trunk Group." A Trunk Group is the combination of software and hardware through which communications move. Level 3 and SBC interconnect over trunk groups that aggregate all forms of traffic (i.e. IP-enabled, circuit switched, ISP-Bound, Transit traffic to and from other carriers.) SBC wants Level 3 to undertake the expense of reconfiguring this network architecture, and has proposed language that would force Level 3 to create separate trunk groups to carry and interconnect various forms of traffic. Level 3 opposes this, and has proposed language that states clearly that Level 3 and SBC will interconnect and exchange traffic over aggregated trunk groups.

Q. PLEASE DESCRIBE THE TYPE OF TRAFFIC LEVEL 3 PROPOSES TO EXCHANGE WITH SBC OVER A SINGLE TRUNK GROUP.

A. Level 3 proposes that the parties exchange all telecommunications traffic, interLATA and intraLATA, over the same trunk group.[21] A single trunk group would carry local exchange, extended area service, intraLATA toll, interLATA toll, exchange access, IP-enabled, ISP-bound, and other miscellaneous telecommunications traffic.

Q. WHAT TYPE OF TRAFFIC DOES SBC SEEK TO EXCLUDE FROM THE TRUNK GROUP ESTABLISHED UNDER THIS AGREEMENT?

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[20] *See* Petition, Tier I Issue 1 and Issue 5. Issues ITR-1, 10, 12, 18, and 19; OET 5, 6, 7, 9, 11, and 12; and IC 1, 8, 17.

[21] *See, e.g.,* ITR Section 1.2.

A. SBC seeks to exclude Level 3's InterLATA toll and IP-enabled services traffic from the trunk group established under the parties' interconnection agreement (See e.g. SBC proposed Interconnection Trunks language, § 5.3.3.1, ITR Issue 12.) SBC would require Level 3 to establish separate trunks from SBC, namely Feature Group D Access, to carry InterLATA toll and IP-enabled services traffic originated by Level 3's customers.

Q. WHAT ARE THE MAIN CONTRACT PROVISIONS IN DISPUTE?

A. There are several provisions of the proposed agreement that emphasize this point. In paragraph 1.2 of the Interconnection Trunk Requirements Appendix (ITR Appendix), Level 3 proposes:

> 1.2 This Appendix provides descriptions of the trunking requirements between **LEVEL 3** and **SBC-13STATE**. All references to incoming and outgoing trunk groups are from the perspective of **LEVEL 3**. The paragraphs below describe the required and optional trunk groups for the exchange of ***Section 251(b)(5) Traffic***, **Telecommunications Traffic**, ***ISP Bound Traffic, IntraLATA toll***, ***InterLATA "meet point"***, mass calling, E911, Operator Services and Directory Assistance traffic.

Also, in Section 4.7 of the Intercarrier Compensation appendix, Level 3 has proposed language (opposed by SBC) that would make clear Level 3's ability to exchange IP-Enabled traffic through existing trunks:

> **4.7 PARTIES AGREE TO ERECT NO BARRIERS TO IP ENABLED SERVICES TRAFFIC**
>
> 4.7.1 **In order for Parties communicating via IP-enabled Services to interact with end users connected to the Internet by means of circuit switched telecommunications services addressed by NPA-NXX codes, the underlying telecommunications provider must effect a net protocol conversion from IP to TDM or TDM to IP format in order to permit the Internet to connect an end users served by a device addressed via the NPA-NXX codes and connected over circuit switched telephone networks.**

4.7.2 **The Parties agree that they will exchange any and all IP Enabled Services traffic over Local Interconnection Trunk Groups.**

This issue is also highlighted by several of SBC's proposed terms. Section 16.1 of the Interconnection Trunking Requirements Appendix (ITR) requires Level 3 modify its existing network configuration to exchange IP-Enabled traffic over a set of different trunks devoted specifically to that traffic. Similarly, SBC has proposed different architecture[22] between the SBC Southwest region (states that include Kansas, Oklahoma, Texas, Missouri and Arkansas) and the other SBC states. Under SBC's proposed terms, Level 3 would be required to establish different trunk groups to each Local Exchange Area in SBC Southwest region, and at each Tandem in SBC's Midwest territory. The following proposed terms are an example:

5.2 **SBC SOUTHWEST REGION 5-STATE** Local Interconnection Trunk Group(s) in each ***Local Exchange AreA.*** **LATA**. ***Inter-Tandem switching is not provided.***

5.2.1 ***A*** Two-way ***Local Only*** **Interconnection** Trunk Group(s) shall be established between **LEVEL 3*'s switch*** and ***each SBC SOUTHWEST REGION 5-STATE Local Only Tandem Switch in the local exchange area.*** **SBC at the single POI per LATA and LEVEL 3 may establish Two-way Local Interconnection Trunk Group(s) at any other point within SBC13-State's network according to LEVEL 3's sole discretion subject to technical feasibility.**

5.2.2 ***A two-way Local Interconnection Trunk Group(s) shall be established between LEVEL 3 switch and each SBC SOUTHWEST REGION 5-STATE Local/IntraLATA Tandem Switch or Local/Access Tandem Switch in the local exchange area. Inter-Tandem switching is not provided.***

* * *

[22] Compare SBC proposed language at ITR Appendix Section 5.2 (Issue ITR-10) to language at ITR Appendix Section 5.3 (ITR-11.)

5.3 ***Local*** Interconnection Trunk Group(s) in each LATA. **SBC MIDWEST REGION 5-STATE**, **SBC CONNECTICUT**, **SBC CALIFORNIA** and **SBC NEVADA**

5.3.1.1 Where **SBC CALIFORNIA, SBC NEVADA** or **SBC MIDWEST REGION 5-STATE** has a single Local/IntraLATA, Local/Access Tandem or Access Tandem Switch in a LATA, **Telecommunications** ***Section251(b)(5)/IntraLATA T***traffic shall be combined on a single Local Interconnection Trunk Group for calls destined to or from all **SBC** End Offices that subtend the Tandem within that LATA. This trunk group shall be two-way and will utilize Signaling System 7 (SS7) signaling.

(**Bold Underline** is proposed by Level 3; ***bold italics*** is proposed by SBC.)

Q. HOW DOES LEVEL 3 INTERCONNECT WITH SBC?

A. Level 3 and SBC exchange traffic over trunk groups that are not dedicated to a particular type of call. IP-Enabled traffic, traffic that SBC would classify as "Local" traffic, and ISP-Bound traffic are all exchanged over the same trunk groups today. SBC's proposed language would significantly modify our current arrangement.

Q. IF INTERCONNECTION USING A SINGLE TRUNK GROUP IS TECHNICALLY FEASIBLE, DOES SBC HAVE A LEGAL DUTY TO PROVIDE IT?

A. Yes. For example, in 1996, the FCC recognized that if an ILEC refused to provide two-way trunking, it would raise costs for new entrants and create a barrier to entry. Therefore, the FCC found that if two-way trunking is technically feasible, ILECs must provide it to meet the just, reasonable and non-discriminatory requirements of Section 251(c)(2)(D).[23] As Mr. Gates will testify, requiring Level 3 to establish two separate trunk groups increases Level 3's costs. As Mr. Wilson will testify, requiring Level 3 to establish two separate trunk groups decreases network reliability. Thus, like a one-way

[23] In the matter of Implementation of the Local Competition Provisions of in the Telecommunications Act of 1996, CC Dkt. No. 96-98, First Report and Order, 11 FCC Rcd. 15499, ¶ 219 (rel. August 8, 1996) (subsequent history omitted) ("Local Competition Order.")

trunk requirement, SBC's multiple trunk group requirement is a barrier to entry. Because it is technically feasible to exchange all traffic over a single trunk group, SBC must offer Level 3 this option under Section 251(c)(2)(D).

Q. WHY DOES SBC WANT TO FORCE LEVEL 3 TO REDESIGN THE EXISTING INTERCONNECTION ARRANGEMENT BY FORCING LEVEL 3 TO DEVELOP VARIOUS TYPES OF TRUNK GROUPS?

A. SBC has not submitted testimony yet, but apparently its position is that the parties will not be able to properly measure the type of traffic exchanged between the parties unless each different type of traffic is exchanged through a different trunk.

Q. ARE THERE TECHNICAL REASONS WHY THE PARTIES NEED TO ESTABLISH SEPARATE TRUNK GROUPS IN ORDER TO APPLY THE CORRECT INTERCARRIER COMPENSATION RATE?

A. No. The question of whether a single interconnection trunk group may be used to exchange all traffic or only interLATA or intraLATA traffic is not dictated by technical feasibility issues. Traffic that is "intraLATA" may be toll traffic or non-toll traffic, just as "interLATA traffic" may also be toll or non-toll. Within each jurisdictional category, traffic needs to be rated with the applicable rate, for example, access or reciprocal compensation. Multiplying trunk groups does not limit the difficulties of applying the appropriate rate. As Mr. Wilson testifies, there are technically feasible methods, which are in use today, to determine and apply the appropriate intercarrier compensation rate to mixed traffic flowing over a single trunk group.

Q. WILL LEVEL 3 PAY SBC'S SWITCHED ACCESS CHARGES FOR TRADITIONAL CIRCUIT SWITCHED PHONE-TO-PHONE INTERLATA TOLL TRAFFIC?

A. When Level 3 is acting as an interexchange carrier, Level 3 will pay access charges for traditional circuit-switched phone-to-phone InterLATA toll traffic. Level 3 believes it is

unnecessary to build separate trunk groups and facilities to carry this traffic hen it would be economically and operationally more efficient to use existing trunk groups and facilities to exchange all traffic.

Q. WHAT IS THE POLICY BASIS FOR LEVEL 3'S POSITION?

A. In today's communication market, a single carrier can provides its customers one-stop shopping. Now that it has Section 271 authority, even SBC offers its customers bundled local, long distance, Internet, and other IP-enabled services. In the past, when SBC offered local service, independent LECs offered local service, and IXCs offered long distance service, SBC established one trunk group to exchange traffic with the LEC and another trunk group to exchange traffic with the IXC. But today, where Level 3 and SBC may operate as both LECs and IXCs, there is no longer any rational basis for continuing an artificial regulatory construct that divides interconnection trunk group and facilities into two categories – LEC and IXC. Continuing this policy perpetuates inefficient, uneconomical network architecture.

Q. ARE THERE POLICY REASONS TO REQUIRE SEPARATE TRUNK GROUPS TO ENSURE APPROPRIATE INTERCARRIER COMPENSATION?

A. No. To the contrary, sound public policy and statutory non-discrimination requirements support exchanging all traffic over a single trunk group.

Q. PLEASE EXPLAIN WHY.

A. As Mr. Gates testifies, SBC carries all types of traffic over a single trunk group and facility within its network. To permit SBC this flexibility and yet require Level 3 to establish two separate trunk groups creates a competitive disadvantage for any competitive carrier including Level 3. Where SBC provides its competitor, Level 3, less

favorable terms and conditions of interconnection than it provides itself, it violates its duty to be "just" and "reasonable" under section 251(c)(2)(D).[24] Also, as the FCC noted in 1996, "applying separate regulatory regimes … with divergent requirements to parties using essentially the same equipment to transmit and route traffic, is undesirable in light of the new procompetitive paradigm created by section 251."[25]

Q. HAS LEVEL 3 NEGOTIATED THE RIGHT TO EXCHANGE ALL TRAFFIC OVER A SINGLE INTERCONNECTION TRUNK GROUP WITH ANY OTHER RBOC?

A. Yes. Level 3 and Bellsouth have executed an interconnection agreement that permits the parties to exchange all traffic, including InterLATA toll and IP-enabled services, over a single trunk group and to bill each carrier in accordance with the appropriate rate for the traffic. As numerous provisions in the BellSouth agreement recognize, it is technically feasible to exchange all traffic on a single interconnection trunk group and still rate traffic at the different intercarrier compensation rates applicable to each type of traffic. As Mr. Wilson testifies, AT&T and Qwest have also been exchanging all traffic over a single trunk group for five years.

Q. WHAT IS THE LEGAL BASIS FOR LEVEL 3'S POSITION THAT ALL TRAFFIC SHOULD BE EXCHANGED OVER A SINGLE TRUNK GROUP?

A. Section 251(c)(2) requires SBC to provide Level 3 interconnection for the exchange of telephone exchange service and exchange access on a non-discriminatory basis. The only limitation imposed by the FCC is that Section 251(c)(2) interconnection not be used

[24] *Local Competition Order* at ¶ 218.

[25] *Local Competition Order* at ¶ 185.

solely for toll service traffic.[26] If, however, a CLEC offers local exchange or exchange access service to others, it may also use the same Section 251(c)(2) interconnection arrangement to exchange toll traffic with the ILEC.[27] As a CLEC providing local service to customers in Missouri, including both telephone exchange service and exchange access, Level 3 satisfies this FCC test.

Q. ARE THERE ANY FCC DECISIONS THAT SUPPORT YOUR RECOMMENDATION THAT THE COMMISSION SHOULD ADOPT LEVEL 3'S POSITION?

A. In 2002, the FCC conducted an arbitration among WorldCom, AT&T, and Cox for the interconnection agreement terms and conditions with Verizon in Virginia.[28] In that case, Verizon attempted to impose on WorldCom the obligation to create trunk group facilities distinct from WorldCom's existing trunk groups solely for the purpose of routing non-local exchange traffic.[29] WorldCom objected because it imposed a disproportionate expense on WorldCom to create these additional trunks. Verizon contended that the separate trunks were necessary to ensure that it was receiving accurate compensation from WorldCom. The FCC rejected the ILECs argument:

> We also find that establishing separate trunks for these calls, as Verizon proposes, would impose costs on WorldCom that are disproportionate to the problem sought to be solved. [FN608] Carriers typically establish separate trunks when traffic levels are sufficient to make separate trunks cost- effective. Establishing separate trunks to carry only minimal volumes of calls would impose disproportionate

[26] *Local Competition Order* at ¶ 191.

[27] *Id.* (". . .a carrier may not obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating interexchange traffic, … if it does not offer exchange access services to others.")

[28] *Virginia Arbitration Order.*

[29] Specifically, busy line verification and emergency interrupt calls for customers that do not use Verizon as their primary operator services provider.

> costs on WorldCom compared to the benefits of Verizon's proposed solution. [FN609]
>
> * * *
>
> We believe, however, that measures less costly than establishing separate trunking may be available to ensure that Verizon receives appropriate payment.[30]

Level 3's proposed language reflects the FCC's conclusions.

Similarly, several state public service commissions have concluded that ILECs should not compel CLECs to create duplicative or parallel trunk groups for only local traffic. For example, the Texas Commission has held that CLECs were permitted to use their existing trunks to exchange non-local traffic with Verizon (and SBC in a different decision[31]):

> the Commission permits Sprint to use multi- jurisdictional trunks, but the traffic combination is limited to local, intrastate intraLATA, and intrastate interLATA traffic. This solution is consistent with Commission precedents allowing multi-jurisdictional trunks, most notably the T2A, and also with Verizon's admitted practice of using combined local and access trunks on some segments of its own network. It will also promote forward-looking network efficiency by moving toward trunks that carry both local and access traffic. . . .The fact that the T2A approved a mix that adds intrastate interLATA traffic shows that commingling traffic to that extent is feasible, and billing concerns are not an insurmountable obstacle. Therefore, the Commission sees no reason that Sprint and Verizon should not be able to go as far as the T2A went with respect to combining multi-jurisdictional traffic on the same transport facility.[32]

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[30] *Virginia Arbitration Order*, ¶ 180 – 182,

[31] Investigation of Southwestern Bell Tel. Co.'s Entry into the Texas InterLATA Telecommunications Market, Project No. 16251, Order No. 50: Approving Proposed Interconnection Agreement as Amended, Texas Public Utilities Commission Order (Aug. 16, 1999) (T2A).

[32] *Petition of Sprint Communications Company L.P. D/B/A Sprint for Arbitration with Verizon Southwest Incorporated (F/K/A GTE Southwest Incorporated) D/B/A Verizon Southwest and Verizon Advanced Data Inc. Under the Telecommunications Act of 1996 for Rates, Terms and Conditions and Related Arrangements for Interconnection,* Docket No. 24306, Texas Public Utility Commission Order , February 17, 2004

While the Texas cases did not include interstate traffic on the single interconnection facility, the case shows that traffic from a number of different jurisdictions can be placed more efficiently on a single facility which reflects the growing evolution in network architecture. As Level 3 has already shown, there is simply no technical reason not combine traffic on the same interconnection facility.

Q. PLEASE SUMMARIZE YOUR RECOMMENDATION ON THIS ISSUE.

A. Level 3 requests that the Commission adopt Level 3's proposed terms and conditions that would make clear that the parties may exchange all telecommunications and IP-enabled services traffic over a single interconnection trunk group. A single interconnection trunk group provides Level 3 interconnection to the SBC network on a non-discriminatory basis and permits both parties to realize network and economic efficiencies that will promote competition in all communications markets.

ISSUE 2: TRANSIT TRAFFIC[33]

Q. COULD YOU PLEASE DESCRIBE TRANSIT TRAFFIC?

A. Transit traffic is traffic that is originated or terminated by a third party local service provider such as an Independent Phone Company (ICO) or a CLEC other than Level 3 which is interconnected with SBC and serves as the interconnecting carrier for that traffic to Level 3. SBC has interconnection trunks to these third-party providers and exchanges traffic with them on a regular basis. If a Level 3 customer calls the customer of a competitive local exchange carrier that is not directly interconnected with Level 3, SBC

[33] *See* Petition, Tier I Issue 2. Issues ITR-2, ITR-5 through ITR-9.

acts as a "hub" and is paid transit rates to carry that traffic between the carriers. The existing SBC and Level 3 interconnection agreement provides the rate that Level 3 pays SBC to transit calls. In addition, the agreement protects SBC by establishing a traffic threshold at which point Level 3 must establish direct interconnection with the third-party carrier.[34]

Q. PLEASE DESCRIBE THE DISPUTE ON THIS ISSUE.

A. Level 3 proposes that the Commission adopt contract language that would maintain the existing transit arrangements between the parties. These interconnection arrangements have been in place with CLECs since the adoption of the 1996 Telecommunication Act, and even before that between SBC and other carriers. Level 3 and SBC had originally intended to extend the Transit appendix from the previous agreement. However, during negotiations SBC stated that it would no longer transit Level 3's traffic under the terms of an interconnection agreement, even though the Act imposes this obligation on SBC.

Q. WHAT ARE THE KEY PROVISIONS OF THE AGREEMENT THAT ARE IN DISPUTE HERE?

A. Because SBC has withdrawn terms for Transit from this agreement, Level 3 has proposed terms and conditions that would provide the basis by which SBC and Level 3 would not only exchange Transit Traffic, but would also compensate each other for that traffic. For example, Level 3 proposes the following in Section 1.2 of the ITR Appendix:

> 4.3 "**Transit Traffic" is local Telecommunications Traffic or Circuit Switched intraLATA toll Telecommunications Traffic originated by or terminated to LEVEL 3 from another Local Exchange Carrier, CLEC [or wireless carrier that transit SBC-13STATE's network. When transit traffic**

[34] See Current SBC – Level 3 Interconnection Agreement, Appendix Interconnection Trunking Requirements, Sections 4.2.1, 4.2.2, Appendix Reciprocal Compensation, Section 6.

through the SBC-13STATE Tandem from LEVEL 3 to another Local Exchange Carrier, CLEC or wireless carrier requires a DS-1's or greater worth of traffic over a consecutive 3 month period, LEVEL 3 will undertake commercially reasonable efforts to establish direct interconnection with that third party. LEVEL 3 may route Transit Traffic via SBC-13STATE's local Tandem or End office switches.

4.3.1 **When transit traffic between the LEVEL 3 network and SBC-13STATE, such as Telecommunications Traffic to another Local Exchange Carrier, CLEC or wireless carrier exceeds a DS-1's worth of traffic for three consecutive months, SBC-13STATE shall establish a direct trunk group between itself and the other Local Exchange Carrier, CLEC or wireless carrier. By establishing this trunk group, SBC-13STATE agrees to use reasonable efforts to minimize the amount of transit traffic it directly routes through the LEVEL 3 network to the third party terminating carrier.**

Q. WHAT IS THE BASIS FOR LEVEL 3'S POSITION?

A. Section 251(a)(1) of the Telecommunications Act of 1996 requires all carriers to interconnect their networks either directly or indirectly for the exchange of traffic. Transit traffic offers a simple and economical method for carriers that exchange small amounts of traffic. Without transit, carriers would be required to build expensive, but little-used networks. The obligation to provide transit gives meaning to the requirement of indirect interconnection in Section 251(a)(1) of the Act. Section 251(c)(2) also requires SBC to provide Level 3 interconnection at any technically feasible point for the exchange of traffic. More specifically, Section 252(c)(2) states that incumbent LECs have a duty to interconnect with telecommunications providers "for the transmission and routing of telephone exchange service and exchange access." We believe that nothing in Section 251(c)(2) limits SBC's interconnection duty to the exchange of traffic between SBC and Level 3. Therefore, SBC must provide Level 3 interconnection to its network so that Level 3 may exchange traffic with other third parties also connected to SBC's network.

Q: WHAT PROVISION IN THE ACT IS THE BASIS OF THE PARTIES DISAGREEMENT?

A. Section 251(c)(2) requires that SBC establish interconnection for the exchange of all traffic with Level 3. The parties fundamentally disagree about whether "traffic" exchanged pursuant to 251(c)(2) interconnection must be between SBC and Level 3 "end users." In our brief, we will explain why both the statue and FCC rules support Level 3's position that SBC must interconnect with Level 3 for the exchange of transit traffic.

Q. DOES LEVEL 3 OPPOSE ESTABLISHING DIRECT INTERCONNECTION TRUNKS WITH OTHER CARRIERS IN ALL CIRCUMSTANCES?

A. No. Level 3's proposed language and past practice makes clear that if the traffic between Level 3 and another carrier exceeds a DS-1 worth of traffic for three consecutive months, Level 3 will establish direct trunks with that other carrier. Level 3 is willing to interconnect with other carriers. However, it is inefficient and uneconomical for SBC to force Level 3 to interconnect with every other carrier in business, where only a small amount of traffic is exchanged.

Q. HAS THE FCC ADDRESSED THIS ISSUE?

A. There is no FCC rule that requires SBC to transit traffic under Sections 251 and 252. However, at least one state commission has used its Section 252(c) arbitration authority to require SBC to provide transit service under Section 251. In addition, this commission previously approved the Level 3 and SBC interconnection agreement that provided for transit traffic and established a traffic threshold at which a carrier like Level 3 would have to directly interconnect with a third-party carrier.

Q. WHAT POLICY REASONS SUPPORT REQUIRING SBC TO TRANSIT TRAFFIC?

A. First, requiring dominant providers like SBC to transit traffic furthers the fundamental goal of universal connectivity to the PSTN. Permitting a dominant provider like SBC to discontinue this key element of interconnection as part of the interconnection agreement could have an adverse impact on end users. Without this exchange of traffic, customers of competitive carriers would not be able to call customers of other CLECs, independent LECs, or CMRS carriers unless and until Level 3 was able to establish direct interconnection arrangements with each one of these carriers. In the Virginia Arbitration Order, the Wireline Competition Bureau found that giving an ILEC unilateral authority to discontinue transit traffic creates "too great a risk that [a CLEC's] end users might be rendered unable to communicate through the public switched network."35

Second, requiring that SBC transit this traffic is the only way to ensure that Level 3 is able to interconnect with other carriers in a manner that is not cost prohibitive. There is no federal process by which Level 3 can arbitrate an interconnection agreement with other carriers. The RBOCs, including SBC, maintain dominant market positions that today form the hub of communications. To ensure that these communications are maintained, the Commission has to continue the terms and conditions that allow Level 3 to exchange traffic with other carriers.

Third, requiring SBC to transit Level 3's traffic furthers the goal of opening local markets to competition. Permitting SBC to discontinue transit under the terms of an interconnection agreement creates a competitive advantage for SBC, and a corresponding competitive disadvantage and market entry barrier for competitive local exchange carriers. All LECs interconnect with SBC of necessity because SBC is the dominant provider in its service territories. Therefore SBC is the only local carrier that can provide

[35] *Virginia Arbitration Order* at ¶ 118.

transit. Requiring SBC to provide transit service removes SBC's competitive advantage. As the Michigan Commission found:

> absent transiting, new competitors would face a significant barrier to entry due to their inability to simultaneously interconnect with every other LEC. Further, given that an important purpose of the FTA is to encourage the development of competition in local exchange markets, the Commission is not persuaded that the FTA should be interpreted to allow Ameritech Michigan to refuse to perform transiting services. Indeed, nothing in the FTA suggests that Ameritech Michigan may refuse to resell any element, function, or group of elements and functions to AT&T for use in the transmission, routing, or other provision of the telecommunications service simply because a direct interconnection with AT&T and another telecommunications provider might obviate the necessity for Ameritech Michigan to perform transiting service. For a competitive marketplace to flourish, new entrants must be able to provide service to customers in an economically viable manner.[36]

There are other state commissions that have similarly maintained the *status quo* and adopted terms and conditions that would allow a CLEC to rely on the interconnection facilities of an RBOC to exchange traffic with other carriers, and we will address that supporting case law in our briefs.

Q. WHAT IS THE INDUSTRY PRACTICE REGARDING TRANSIT TRAFFIC?

A. Industry practice is for incumbent LECs such as SBC to provide transit under interconnection agreements, particularly given the relative low volumes that are typically exchanged in this manner.

Q. WILL LEVEL 3 COMPENSATE SBC FOR TRANSIT TRAFFIC?

A. Yes. Level 3 will compensate SBC at current, state-approved rates for transit.

[36] *In the Matter of the Petition of AT&T Communications of Michigan, Inc, for arbitration to establish an interconnection agreement with Ameritech Michigan*, MPSC Case Nos. U-11151, U-11152, Order Approving Agreement Adopted by Arbitration, Nov 26, 1996. *See also, In the Matter of the Application of Sprint Communications Company, LP for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan*, MPSC Case No. U-11203, Order Approving Arbitration Agreement with Modifications, Jan 15, 1997.

Q. WILL LEVEL 3 TRANSITION TO DIRECT INTERCONNECTION WITH THIRD PARTY LECS?

A. Yes, once the contractually established traffic threshold is reached with a third party LEC. Level 3 proposes to continue the parties' current practice of moving from SBC's transit service to direct interconnection with the third party LEC once traffic between Level 3 and the third party LEC reaches a DS-1 level (24 trunks) for three consecutive months.[37]

Q. IF THE COMMISSION DETERMINES THAT TRANSIT IS NOT REQUIRED UNDER SECTIONS 251/252, DO YOU HAVE A RECOMMENDATION ABOUT WHAT THE COMMISSION SHOULD DO WITH RESPECT TO TRANSIT?

A. Yes. It is my understanding that SBC will continue to offer transit pursuant to a separate commercial agreement. If, contrary to Level 3's recommendation, the Commission determines that SBC is not required to provide transit service under this agreement, it must require SBC to provide transit service pursuant to state tariff or other filed agreement. Permitting SBC to enter confidential commercial transit agreements with CLECs, CMRS providers, and independent LECs is an invitation to discriminate against CLECs, SBC's primary competitors in the local market.

Q. WHAT IS LEVEL 3'S RECOMMENDATION ON THIS ISSUE?

A. The Commission should follow existing industry practice and adopt Level 3's proposed language. By doing so, the Commission will strike a balance that guarantees that all telecommunications end users will be able to communicate with customers on the networks of other providers, ensure that SBC is compensated for the service it provides

[37] *See* Interconnection Trunking Requirements, Section 4.3.

and establishes clear rules for when competitive carriers must establish direct interconnection trunks.

ISSUE 4: UNBUNDLED NETWORK ELEMENTS. [38]

Q. PLEASE EXPLAIN THE ISSUE IN DISPUTE.

A. Level 3 seeks to preserve access to unbundled network elements as provided for by Sections 251 and 271 of the Act and the applicable state law. SBC, on the other hand, would impose language that allows it to unilaterally terminate access to UNEs or UNE combinations, regardless of state or federal law.

Q. PLEASE DESCRIBE LEVEL 3'S POSITION WITH THE RESPECT TO THE CONTRACT TERMS THAT SHOULD BE INCORPORATED.

A. As the Commission is aware, on August 20, 2004, the Federal Communications Commission issued its Order and Further Notice of Proposed Rulemaking.[39] In this *Interim Order* the FCC puts a halt to arbitration proceedings adjudicating the terms and conditions by which incumbent local exchange carriers provide unbundled network elements to CLECs, and instead establishes a one-year transition period for the provision of unbundled network elements. The *Interim Order* provides that:

> To that end, we set forth a comprehensive twelve-month plan consisting of two phases to stabilize the market. First, on an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated

[38] *See* Tier I, Issue 4 in Petition; Unbundled Network Elements Issue UNE – 1.

[39] *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* WC Dkt. No. 04-313, FCC 04-179, Order and FNPRM (Rel. Aug. 20, 2004) (*FCC Interim Order.*).

agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements. Second, we set forth transitional measures for the next six months thereafter. Under our plan, in the absence of a Commission holding that particular network elements are subject to the unbundling regime, those elements would still be made available to serve existing customers for a six-month period, at rates that will be moderately higher than those in effect as of June 15, 2004.

The one-year transitional regime described above is designed to provide a reasonable timeframe for the Commission to complete its work while interim protections remain in place.

Q. SHOULD THIS COMMISSION PROCEED TO DETERMINE THE CONTRACT LANGUAGE THAT WILL GOVERN LEVEL 3'S ACCESS TO UNBUNDLED NETWORK ELEMENTS EVEN THOUGH THE FEDERAL RULES FOR THOSE NETWORK ELEMENTS HAVE NOT YET BEEN SET?

A. No. While the FCC's rules are not the only relevant or binding legal authority by which SBC must provide network elements to Level 3, the Commission should not determine whose contract language will apply with respect to UNEs until the FCC resolves the underlying rules. The FCC even stated that any effort to litigate what the rules are with respect to network elements is "wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible."[40] Consequently, the FCC stated that it was not only imposing an interim set of rules for the availability of unbundled network elements, it also declared that state commissions were not to arbitrate the availability of network elements pending their rulemaking proceeding.[41]

Q. SBC HAS PROPOSED AN APPENDIX THAT WOULD SUPPLANT THE CURRENT UNE TERMS. WHAT IS LEVEL 3'S POSITION WITH RESPECT TO THOSE TERMS AND CONDITIONS?

[40] *Interim Order*, 17.

[41] *Interim Order,* 23.

A. We believe that in light of the FCC's *Interim Order*, the state commissions cannot, or at least, should not proceed to adjudicate whether those terms comply with the FCC's rules, at least not until the FCC actually issues its rules. However, the terms and conditions proposed by SBC are not consistent with the state of the law, and the Commission should reject those terms.

Q. IN WHAT WAY IS SBC'S PROPOSED APPENDIX NOT CONSISTENT WITH THE FCC'S RULES?

A. SBC'S proposed Appendix states that SBC has no obligation to provide switching as an available network element. [See Section 11 or SBC's proposed Appendix.] As of the date that Appendix was filed with the Commission (August 30, 2004), SBC had no right to deny Level 3 switching as an available network element. Similarly, under SBC's proposed appendix, it would not provide DS1 loops as an available network element. As of August 30, 2004, when SBC submitted that appendix to the Commission for approval, that provision was not enforceable. FCC Chairman Michael Powell, in a statement released simultaneously with the release of the *Interim Order,* stated that the FCC's objective is to schedule the decision for a vote at the FCC's December 2004 open meeting. FCC Chairman Michael Powell also "expressed a commitment and some confidence that DS1 loops and transport will remain unbundled elements for facilities-based providers." Similarly, FCC Commissioner Kathleen Q. Abernathy, in her simultaneous statement, indicated that it "bears emphasis that a clear majority of the Commission has advocated the continued unbundling of DS-1 facilities in most circumstances and has also called for issuing new unbundling rules well before the interim period ends." In light of these comments, there is no foundation for the

Commission to adopt SBC's proposed UNE Appendix. Level 3 has a right to obtain UNEs from SBC pursuant to Sections 251 and 271 of the Act. Independent of the Act, SBC must also provide UNEs pursuant to paragraph 394 of the *SBC-Ameritech Merger Order*[42] and applicable state law. SBC, however, wants the authority to self-determine what its obligations are under the agreement. It has peppered their proposed agreement with the concept of a "Lawful UNE,"[43] which would permit SBC to interpret decisions and orders of relevant authorities and decide, unilaterally, what elements it is no longer obligated to unbundle. Based on this determination, SBC would then be permitted to terminate access to these elements without amending the agreement or negotiating with Level 3.

Q. HOW WILL THE COMMISSION ULTIMATELY DETERMINE THE APPROPRIATE TERMS AND CONDITIONS THAT SHOULD APPLY TO THE PARTIES' INTERCONNECTION AGREEMENT?

A. After the FCC adopts rules that will identify the network elements that must be unbundled, SBC can serve an appropriate notice to Level 3 to start the dispute resolution process to amend the parties' current terms and conditions. If the parties cannot agree on the appropriate amendments to the existing agreement, then the parties can engage in dispute resolution. In the meantime, the Commission should take no action on SBC's

[42] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules,* CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 App. C para. 53 (1999) ("*SBC-Ameritech Merger Order*"). Unlike other merger conditions, these have not expired, instead remaining applicable pending a final and nonappealable order in the UNE Remand proceeding. *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 17 FCC Rcd 19595 n. 7 (2002).

[43] *See e.g.* Unbundled Network Elements, Section 2.1.2.1, 2.1.2.3, 2.1.3, 2.2., 2.3

proposed appendix, and should incorporate the parties' existing agreement for the availability of unbundled network elements. The best option for the parties and the Commission is to adopt the existing interconnection agreement appendix, and make that appendix a part of the interconnection agreement approved by the Commission.

ISSUE 6: INTERCARRIER (RECIPROCAL) COMPENSATION[44]

Q. HOW IS THIS SECTION OF YOUR TESTIMONY ORGANIZED?

A. This section of my testimony will address two issues. The first relates to the appropriate level of intercarrier compensation for IP-Enabled Services. The second part will address the use of a foreign exchange network architecture and the appropriate compensation for that interconnection arrangement.

Q. PLEASE BRIEFLY DESCRIBE THE DISPUTE CONCERNING IP-ENABLED SERVICES.

A. Issue 6 concerns which intercarrier compensation regime applies for traditional voice traffic and voice applications exchanged between the parties, including customers that purchase foreign exchange-like services.

Q. WHAT IS LEVEL 3's POSITION ON ISSUE 6.

A. Level 3's position is that terminating carrier is entitled to cost-based reciprocal compensation for terminating traffic on its network that originates on the network of another carrier.

Q. **IS LEVEL 3 PROPOSING A RATE FOR THE EXCHANGE OF IP-ENABLED TRAFFIC?**

A. Yes. Level 3 is proposing a rate of .0007 for the exchange of all traffic including IP-Enabled services. This is the rate that applies to the exchange of ISP-Bound traffic under

[44] *See* Petition, Tier I Issue 6. Petition, Issues IC-1 through IC-22.

the FCC's *ISP Remand Order*. I would point out that Level 3 believes that the appropriate forum to resolve the issue for the exchange of non-ISP-Bound IP Enabled traffic is issue is through the Level 3 Forbearance Petition. However, since SBC has presented the issue in this arbitration, I will discuss it at some length.

Q. WHY HAS LEVEL 3 PROPOSED A UNIFORM RATE FOR ALL TRAFFIC?

A. Level 3 has proposed a uniform rate for a couple of reasons. First, it reflects the existing regime in place between Level 3 and SBC. This seems to be a reasonable approach given the number of federal proceedings that will impact the eventual treatment of the various forms of traffic. Secondly, there is a strong preference in the industry to move toward a rationalized rate structure. The FCC expressed its intention to move toward a uniform rate structure. In addition, a recent proposal from the Intercarrier Compensation Forum, of which Level 3 and SBC are members, to reform intercarrier compensation drives toward a uniform rate structure. Given the fluid nature of the intercarrier compensation regime at this point, it makes for sound public policy to move toward a unified rate structure.

Q. WHAT IS SBC'S POSITION ON ISSUE 6?

A. SBC's view is that the originating carrier is entitled to access charges**.**

Q. WHY IS THIS ISSUE LIMITED TO VOICE SERVICES?

A. I limit this issue to voice customers because the FCC has already established the intercarrier compensation regime for ISP-bound traffic, including ISP-bound traffic terminated to customers utilizing FX-like services. As many state commissions have already held, state commissions do not have jurisdiction to alter the FCC's regime when an ISP uses an FX-like service. Level 3 will fully address legal arguments of this jurisdictional issue in post hearing briefs.

Q. AS A THRESHOLD MATTER, IS THERE A DISAGREEMENT BETWEEN LEVEL 3 AND SBC AS TO THE DEFINITION OF "IP ENABLED SERVICES" OR "IP TRAFFIC"?

A. In many respects, I believe that SBC and Level 3 are fundamentally in agreement on a definition of IP Enabled Services or IP Traffic with respect when we are discussing the origination of the traffic. I think there is a disagreement on how to view such traffic from a terminating perspective.

Q. PLEASE EXPLAIN WHERE SBC AND LEVEL AGREE?

A. Reviewing SBC's proposed contract language, it appears Level 3 and SBC agree in concept with respect to the type of traffic that should be included within the definition of what Level 3 calls "IP-Enabled Services," which SBC refers to as "IP Traffic." SBC's definition of "IP Traffic" states that it "is limited to traffic originated on customer premises equipment of the end user of the CLEC or SBC that originated and/or dialed a call in the IP format and transmitted to the switch of a provider of voice communications applications or services when such switch utilizes IP technology."[45]

Level 3's definition of "IP-enabled Services" states, "IP-enabled Services are defined as, and include, services and applications relying on the Internet Protocol family ("IP"), which could include digital communications of increasingly higher speeds that rely upon IP, as well as higher level software services that could be invoked by the end user or on the end user's behalf to make use of communications services. Thus, the term IP-enabled Services includes 'applications' and 'services' because communications over the Internet are possible with both forms."[46] Level 3's definition of IP-enabled traffic is also

[45] SBC Proposed Appendix Interconnection § 17.1.

[46] Level 3 Proposed Appendix Intercarrier Compensation § 3.2.1.1.

consistent with the FCC's definition of IP-enabled traffic in the *Vonage Order*. In the *Vonage Order,* the FCC described that IP-enabled traffic includes "any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony."

Q. DOES LEVEL 3'S DEFINITION OF IP-ENABLED SERVICES CAPTURE PHONE-TO-PHONE TRAFFIC AS DEFINED IN THE AT&T DECISION?

A. No. As discussed previously, Level 3's proposed definition of IP-enabled services does not include "phone-to-phone" traffic as defined in the FCC's *AT&T Declaratory Ruling*, which is clear from the fact that sections 3.4.4-3.4.4.1 exclude traffic that "originates and terminates on the public switched telephone network (PSTN); and the call undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." In its FCC Comments, SBC states that to be an IP-enabled service, a communication must "cross the demarcation to a service provider's network" in IP format; "in other words, the communication between the end user and the service provider must be in IP format."[47] Level 3 agrees with this description of an IP-enabled service.

Q. WHERE DO LEVEL 3 AND SBC DISAGREE ON THE DEFINITION OF IP-ENABLED SERVICES OR IP TRAFFIC?

A. Level 3 disagrees with SBC's proposed definition of "IP traffic" on two fronts. First, it includes only traffic "originated" from an IP end user, and does not include traffic terminated to an IP end user. SBC's own definition of IP-Enabled Services before the FCC contemplates a two-way flow of traffic. Secondly, SBC's definition is overly restrictive because it introduces a requirement that the traffic must be "originated on

[47] *Id.* at n. 42.

customer premises equipment of the end user of the CLEC or SBC that originated and/or dialed a call in the IP format."[48] This further limitation is too narrow and is not found in any FCC rule or regulation. The traffic exchanged between Level 3 and SBC may originate on the customer premises equipment of the end user of an information service provider, CLEC, ILEC or other telecommunications carrier, which provider itself is Level 3's customer. There is no rational basis for limiting the definition of "IP Traffic" or "IP-enabled Services" as proposed by SBC.

Q. BEFORE TURNING TO THE APPLICABILITY OF ACCESS CHARGES TO IP-ENABLED SERVICE, PLEASE EXPLAIN WHETHER LEVEL 3 AND SBC AGREE THAT IP-ENABLED SERVICES ARE INTERSTATE SERVICES?

A. I believe that SBC and Level 3 agree that IP-enabled services are interstate services as Level 3 would define them, and as SBC appears to have defined them in its comments in response to the FCC's IP-enabled services NPRM. In its FCC Comments, SBC stated, "The inherently interstate nature of these [IP-enabled] services derives from the nationally and internationally dispersed networks over which they are provided. These services are also *indivisibly* interstate because their portable nature and the inherent geographic indeterminacy of IP transmissions make it infeasible to segregate any intrastate component of these services for regulatory purposes."[49] Moreover, SBC further observed that "with an IP-enabled service, like other Internet-based services, a 'user may, for example, access websites that reside on servers in various state[s] or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country, and may do so either sequentially or simultaneously.'"[50] SBC concluded, "thus, when end users use an

[48] SBC Proposed Appendix Interconnection § 17.1.

[49] SBC IP-Enabled Services Comments at 26.

[50] *Id*. at 28, *quoting GTE Order* at 22478-79 (¶22, footnote omitted).

IP-enabled service to communicate with each other, the interstate nature of the service is engaged no matter where the end users are physically located."[51]

SBC has further explained in its own Petition for a Declaratory Ruling Regarding IP Platform Services, filed at the FCC:

> "On traditional telephone networks, it generally is possible to determine whether a call is interstate or intrastate because single carrier provides a physical connection to the end user. But the technology underlying IP platform services renders the notion of an 'intrastate' call almost meaningless. As convergence continues, a data stream may simultaneously include packets (consisting of voice, data, video, or some combinations thereof) bound for points both in and outside any given state. Because there is no feasible way for carriers to track, on a bit-by-bit basis, the exact content or routes of those packets on an IP platform, it would be impracticable, as well as inimical to the technological premise of the Internet, to separate out any discrete, 'intrastate' components of that data stream.
>
> "Such tracking theoretically could be 'possible,' if one embraces the principle that with enough time and money *anything* is possible from a technological perspective. But there is no *service-driven* reason for committing those resources to develop such tracking capabilities. In a dynamic, competitive industry, it makes little sense to devote dollars to developing useless, inefficient technological capabilities that would improve neither service nor efficiency. But this is precisely what would be required to try to break the integrated flow of traffic on the Internet down into jurisdictional chunks. The ramifications of such an effort would be significant and negative for the development of new and innovative IP services and applications.
>
> "The difficulty of delineating the interstate and intrastate portions of an Internet communication would be compounded by the increasingly portable nature of IP platform service offerings. End users can take their laptops to any location but 'virtually' remain in their home office. Consider again two end users in Washington, D.C. One may take his laptop to San Francisco while keeping in e-mail contact with his acquaintance back in Washington, D.C., who may not even know that his correspondent has flown to the other side of the country. And VoIP permits telephone calls to be placed with the same geographical indifference: Depending on the particular service used, a user can plug his phone into any broadband connection anywhere in the country, and the call will appear to be placed from the user's chosen area code."[52]

Level 3 fundamentally agrees with these points made by SBC in its FCC comments and Petition for a Declaratory Ruling as to the interstate nature of IP-enabled services. Indeed, as part of its definition of IP-enabled services, Level 3 proposed language stating,

[51] *Id*.

[52] SBC Petition at 37-39 (emphasis in original, footnotes omitted).

"Because IP-enabled Services are enabled by use of IP and the Internet, IP-enabled services share the non-geographic nature of electronic communications conducted over the Internet."[53] Level 3 further proposed contractual language that IP-enabled services are "interstate in nature."[54]

Q. DOES THE RECENT *VONAGE ORDER* ALSO DISCUSS WHETHER IP-ENABLED TRAFFIC IS INTERSTATE IN NATURE?

A. Yes. The FCC issued the *Vonage Order* in response to Vonage challenging a ruling issued by the Minnesota Public Utilities Commission in which that commission asserted regulatory authority over Vonage as an entity providing "telephone service" under state law. The Vonage VoIP service, DigitalVoice, over which the Minnesota Commission sought to exercise state regulatory jurisdiction, is a service which permits IP-PSTN and PSTN-IP calls, as well as IP-to-IP calls. In its Order, the FCC determined that the characteristics of the traffic in question could not be separated into interstate and intrastate communications "for purposes of effectuating a dual federal/state regulatory scheme.[55] Consequently, the FCC asserted exclusive jurisdiction over the regulation of this form of traffic. Notably, the FCC also indicated that it would resolve the question of the appropriate form of compensation for IP-enabled traffic in its *IP-enabled Services Rulemaking proceeding.*[56]

[53] Level 3 Proposed Appendix Intercarrier Compensation § 3.2.1.1.1.

[54] *Id*. at § 3.2.1.2.

[55] *Vonage Order, ¶ 14*

[56] *Id.*, fn. 46.

Q. IF THESE SERVICES ARE INTERSTATE, WHY IS SBC NOT ENTITLED TO LEVY ACCESS CHARGES ON THIS TRAFFIC?

A. SBC is not entitled to collect access charges on IP-Enabled Services or IP Traffic, however defined, because such traffic has been historically exempt from access charges. As interstate traffic, SBC may only assess access charges, if at all, when permitted to do so under the FCC's access charge rules. SBC may not levy *intrastate* access charges on *interstate* traffic.

The FCC rules do not permit the imposition of a "carrier's carrier charges" on entities that are not interexchange carriers, and particularly not on information service providers (also sometimes called "enhanced service providers" or 'ESPs"), which are "end users," not "carriers" under the FCC's access charge rules. FCC Rule 69.5 governs the assessment of circuit-switched per-minute access charges.[57] The rule affirmatively classifies access customers as either "end users" or "carriers."[58] Customers classified as end users pay "end user charges,"[59] whereas "all interexchange carriers" that use local exchange switching facilities for the provision of interstate "telecommunications services" pay "carrier's carrier charges."[60] There is no equivocation in these classifications.

There is no doubt as to the meaning of this rule. The FCC, when it adopted the access charge regime, envisioned that it would "apply these carrier's carrier charges to interexchange carriers, and to all resellers and enhanced service providers other than

[57] *See* 47 C.F.R. § 69.5.

[58] Rule 69.5(a) governs end users, and Rule 69.5(b) governs carriers. Rule 69.5(c) provides for special access charges surcharges. *See* 47 C.F.R. § 69.5.

[59] In general, end users pay local business rates and interstate subscriber line charges for their switched access connections to LEC central offices.

[60] 47 C.F.R. § 69.5(b).

those, such as hotels, who provide their communications service solely at their own premises, or where the service is intended for internal administrative purposes."[61] The FCC, however, never implemented that initial vision with respect to ESPs. To the contrary, to avoid "rate shock" and to have "time to develop a comprehensive plan for detecting all such usage and imposing charges in an even-handed manner," the Commission decided to treat ESPs as end users, rather than carriers, with respect to carrier access charges, and it limited the application of carrier charges to "interexchange carriers."[62] Thus, as the FCC acknowledged when it again reviewed its Part 69 rules as they related to enhanced services providers, "[u]nder our present rules, enhanced service providers are treated as end users for purposes of applying access charges."[63]

The FCC reaffirmed the status of ESPs as end users in its 1988 *Enhanced Services Providers Order*:

> [T]he current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users.[64]

And that status was carried over in the 1996 Act,65 which mirrors the definitions of "basic" and "enhanced" services in its terms "telecommunications service" and

[61] *MTS and WTS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d. 682, 711 (¶ 76) (1983).

[62] *Id*. at 715 (¶ 83); 47 C.F.R. § 69.5(b).

[63] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631 (¶ 2 n.8)(" *ESP Exemption Order*").

[64] *Id.*, 3 FCC Rcd at 2633 (¶ 20 n.53); *see also Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. Sec. 160(c) from Enforcement of 47 U.S.C. Sec. 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, Global Crossing Comments at 8, WC Docket 03-266 (filed Mar. 1, 2004) ("*Level 3 Petition*").

[65] The broadly applicable end-user classification had been affirmed again in 1991. *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4535 (¶ 60) (1991).

"information service."66 Moreover, the Act defines a "telecommunications carrier" as a provider of telecommunications services, and it clarifies that a telecommunications carrier cannot be a common carrier with respect to services that are not telecommunications services.67 Thus, information service providers, like their predecessor ESPs, are even more clearly end users, not carriers, under the terms of Rule 69.5.[68]

Since the adoption of the 1996 Act, the FCC has reaffirmed information service providers' status as end users, rather than interexchange carriers, under Rule 69.5.69 In its First Report & Order in the Access Reform docket, the Commission (referring to both ESPs and providers of information services as information service providers)70 again noted that since the 1983 Access Charge Reconsideration Order, "ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries."71 It then made clear that it was not altering that classification or its effect under Rule 69.5: "We decide here that [information service providers] should not be subject to interstate access

[66] *See* 47 U.S.C. §§ 153(46), 153(20).

[67] *See* 47 U.S.C. §§ 153(20), (43), (44), (46).

[68] While the definition of "information services" is not identical to the definition of "enhanced services," "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services.'" *Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. at 21905, 21955 (¶ 102)(1996).

[69] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charge*, First Report and Order, 12 FCC Rcd. 15982 (1997)("*Access Charge Reform Order*") *Aff'd* 153 F.3d 523 (8th Cir. 1998)

[70] *See Id.* at 16131 (¶ 341 n.498).

[71] *Id.* at 16132 (¶ 342).

charges."[72] The Commission thus foreclosed all doubt as to whether the change in terminology from "enhanced service" to "information service" in the 1996 Act somehow altered the so-called "ESP exemption." Moreover, as in all previous orders dealing with the exemption, the Commission did not distinguish between various types of information service providers based on their use of the underlying PSTN.

Finally, I would note that in the context of Level 3's proposed agreement, SBC is never required to deliver its IP-enabled services traffic outside of a LATA in order to exchange that traffic with Level 3. As with all other traffic subject to Section 251(b)(5), SBC would be required to haul its originated traffic to its POI with Level 3 (of which there must be at least one in each LATA), and to terminate Level 3's originated traffic from that POI to SBC's end users.

Accordingly, there is no basis in the FCC's access charge rules for SBC to assess access charges on IP-enabled services traffic.

Q. DO LEVEL 3 AND SBC DISAGREE THAT IP-ENABLED SERVICES, AS YOU WOULD DEFINE THEM, ARE INFORMATION SERVICES, RATHER THAN TELECOMMUNICATIONS SERVICES, UNDER THE COMMUNICATIONS ACT?

A. No. I believe that SBC and Level 3 agree that IP-enabled services are information services under the Communications Act. In its recent comments to the FCC, SBC stated, "IP-Enabled services should be deemed Title I information services."[73] As SBC observed, "IP-enabled services may allow end users to connect to the Internet (a

[72] *Id.* at 16133 (¶ 345). Because "the access charge system contains non-cost-based rates and inefficient rate structures," the Commission believed that the rule was still needed to promote the "still-evolving information services industry." *Id*., at 16133 (¶ 344-345). The Commission also discredited the theory that nonassessment of access charges results in information service providers imposing uncompensated costs on ILECs (*see id.* at 16133-34 (¶ 346)), as well as ILEC allegations regarding network congestion. *See id*. at 16134 (¶ 347).

[73] *SBC IP-Enabled Services Comments* at 33.

functionality that the Commission has long deemed an information service, gain access to stored files (such as voicemail or directory information), protect their privacy through customized call screening, and route communications in a manner customized to the end user's preferences. Many IP-enabled services also include a net protocol conversion that allows customers to interface with the PSTN – traditionally a hallmark of information services under the Commission's precedent."[74]

Q. ARE THERE OTHER POLICY OR LEGAL REASONS THAT PREVENT SBC FROM LEVYING ACCESS ON IP-ENABLED SERVICES?

A. Yes. Although SBC asserts that access charges apply to IP-enabled services, they fail to consider the D.C. Circuit's decision in *WorldCom v. FCC*, interpreting the scope of the FCC's authority under Section 251(g). As the FCC has held, the reciprocal compensation obligations of Section 251(b)(5) apply to all "telecommunications traffic" exchanged between a LEC and another telecommunications carrier, except where Section 251(g) "explicitly exempts certain telecommunications services" from Section 251(b)(5).[75] In the Commission's words, "Congress preserved the pre-Act regulatory treatment of all access services enumerated under section 251(g)."[76]

The D.C. Circuit in *WorldCom* made clear that Section 251(g) only preserves "restrictions and obligations" that existed prior to the 1996 Act.[77] The court noted that "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."[78] The court further observed that "[Section] 251(g) speaks only of services

[74] *Id*. at 34.

[75] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9166 (¶ 32)(2001)(" *ISP-Bound Remand Order*").

[76] *Id*. at 9169 (¶ 39).

[77] *See WorldCom*, 288 F.3d at 433.

[78] *Id*. (emphasis in original).

provided 'to interexchange carriers and information service providers'; LECs' services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP."[79] Section 251(g), said the court, "is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act."[80] The court overturned the Commission's assertion that it could establish an intercarrier compensation regime for the exchange of Internet Service Provider-bound ("ISP-bound") traffic between two LECs pursuant to Section 251(g) when no pre-Act rule existed.

Just as with ISP-bound traffic, the D.C. Circuit's interpretation of Section 251(g) in *WorldCom* applies to intercarrier compensation between two LECs for traffic originated on the PSTN bound for a provider of IP-enabled services, or terminated on the PSTN from a provider of IP-enabled services. Indeed, a call from an ILEC end user to an ISP served by a CLEC follows the same route as a call from an ILEC end user to an IP-enabled services provider served by a CLEC. As there was no "pre-Act" rule governing the exchange of ISP-bound traffic between two LECs, there also was no "pre-Act" rule governing the exchange of ESP-bound traffic between two LECs. In fact, because Internet Service Providers are a subset of ESPs (or, in 1996 Act terms, "information service" providers),[81] had there been a rule governing intercarrier compensation between two LECs for traffic bound for an ESP, that rule would have also governed intercarrier compensation between two LECs exchanging traffic bound for an Internet Service Provider. That there was no pre-1996 Act rule governing intercarrier compensation *between LECs* for IP-enabled services traffic exchanged between those LECs is further

[79] *Id*. at 433-434.

[80] *Id*. at 430.

[81] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. at 11501, 11536 (¶ 73).

demonstrated by the fact that SBC now proposes to tariff a new "Feature Group IP" or some future Internet Protocol feature group to apply to such traffic, as well as the FCC's directive in Footnote 92 of the *AT&T Declaratory Ruling* that access charges, when they are assessed, be assessed against an "interexchange carrier" and not against "any intermediate LECs that may hand off traffic to the terminating LECs."

Moreover, there was also no pre-Act rule governing intercarrier compensation between two LECs when traffic was bound *from* an ESP *to* an end user. It would not have come up. At that time, there were no CLECs serving ESPs that were sending traffic to ILEC customers. Although the so-called "ESP exemption" existed – which, as discussed previously, was a classification decision, not an exemption – it only governed charges that an ILEC could levy on an ESP customer, not charges that an ILEC levied on an interconnected LEC. Again, as the D.C. Circuit concluded, "LECs' services to other LECs" are not the same as LECs' services "'to either an IXC or to an ISP."[82] In short, there were no pre-Act rules governing the exchange of traffic between LECs that could be preserved by Section 251(g) with respect either to PSTN-originated traffic to an IP-enabled services provider or PSTN-terminated traffic from an IP-enabled services provider. And, as the Commission held in the *ISP-Bound Remand Order*, without Section 251(g), the reciprocal compensation regime of Section 251(b)(5) applies to the exchange of all traffic between an ILEC and another telecommunications carrier, such as Level 3. [83]

Accordingly, the D.C. Circuit's decision in *Worldcom* precludes application of interstate access charges to the exchange of IP-enabled services traffic between SBC, an ILEC, and Level 3, a CLEC. Traffic exchanged between LECs that is bound for or

[82] *WorldCom*, 288 F.3d at 434.

[83] *See ISP-Bound Remand Order*, 16 FCC Rcd at 9165-66 (¶ 31).

originates from an information services provider providing IP-enabled services must therefore be subject to Section 251(b)(5)'s reciprocal compensation regime.

Q. ARE THERE ADDITIONAL POLICY REASONS WHY IS IT IMPORTANT TO APPLY RECIPROCAL COMPENSATION, RATHER THAN ACCESS CHARGES, TO THE EXCHANGE OF IP-ENABLED SERVICES TRAFFIC?

A. Yes. Because Information Service Providers, under the "ESP exemption" have the right to purchase business line services from ILECs to provide their services, if other carriers must pay access charges to the ILEC when Information Service Providers purchase comparable services from a CLEC, the CLEC will never be able viably to compete with the ILEC. Because the ILEC has the largest customer base, all other network providers will need to interconnect with the ILEC in order to have a viable service. The ILEC will then increase the costs of all providers interconnecting with the ILEC network by charging originating and terminating charges to all other providers, who will have the vast bulk of their traffic originating or terminating on the ILEC network, rather than on their own networks. This leads to a classic "tipping" phenomenon in which the ILEC can "tip" the market back to monopoly by its control over interconnection. Thus, IP-enabled services will best grow if they are left free to respond to customer demand and expectations, without being shoehorned into an antiquated access charge regime that was not designed to address local competition among circuit-switched providers.

In addition, because it is not possible to track the geographic end point of the IP end of an IP-enabled service (Level 3 and SBC agree that it is not possible to do so), it does not make sense to force IP enabled service providers or the carriers serving those providers to develop the capability to do so at a time when the FCC is considering shifting the access charge system to a unified intercarrier compensation system that

would not require tracking the geographic end point of the IP end of a call. Furthermore, application of an access charge to all IP-enabled service traffic originated or terminated over SBC facilities, as SBC appears to propose in some provisions, would dramatically skew the competitive environment against providers of IP-enabled services that compete directly with traditional circuit-switched services offered by SBC and others.

Q. HOW WOULD APPLYING AN ACCESS CHARGE TO ALL IP-ENABLED SERVICES TRAFFIC MINUTES ORIGINATED OR TERMINATED OVER SBC'S PSTN FACILITIES SKEW EMERGING LOCAL COMPETITION FROM IP-ENABLED SERVICE PROVIDERS?

A. Although SBC's proposed treatment of what it calls "IP Traffic" is a little unclear, to the extent SBC is proposing that, through its Feature Group D tariffs or some unspecified later "Internet Protocol access product," an access charge be applied to all IP-enabled services traffic originated or terminated over SBC's PSTN facilities, such a result would dramatically skew emerging local competition from IP-enabled service providers.

FCC statistics show that, in 2000 – the last year for which complete, actual data is available – NECA reported that approximately 78.2% of Dial Equipment Minutes were local, 9.5% were intraLATA toll, and 12.3% were interLATA toll.[84] This means that access charges (whether interstate or intrastate) did not apply to nearly 80% of switched telecommunications traffic. For that 80% of traffic, for a circuit-switched POTS provider, any intercarrier compensation is governed by reciprocal compensation under Section 251(b)(5) or the FCC's ISP-bound compensation rules, neither of which permit the ILEC to assess an origination charge.

To the extent SBC is proposing to require originating access charges to be paid on 100% of IP-enabled service traffic originating from an SBC end user and terminating on an IP network, it would place emerging local competition from IP-enabled services at a

[84] Table 8.3, "Dial Equipment Minutes Summary," Universal Service Monitoring Report 2003, FCC Docket No. CC 98-202, at 8-6 (rel. December 22, 2003).

tremendous competitive disadvantage vis-à-vis circuit switched POTS service. For the 80 percent of SBC minutes that are not now subject to access charges, an IP enabled service provider, would pay originating access on all minutes while a circuit-switched POTS provider would pay no originating access charges, and would, if it was a CLEC, be paid reciprocal compensation. (To the extent SBC also provided service to the terminating customer, SBC would obtain its compensation for termination from its customer.) The IP service provider would be paying access on five times the minutes as the circuit-switched provider.

By imposing originating charges on IP-enabled services providers, or carriers serving those providers, SBC would be exercising the same market power that it had over CMRS providers prior to the 1996 Act. It was not until the FCC issued its rules implementing the 1996 Act that ILECs were finally prohibited from using their market power to extract origination fees from CMRS providers and other carriers.[85] SBC should not be allowed to resurrect such market power abuse.

Q. PLEASE SUMMARIZE YOUR POSITION ON THE APPROPRIATE COMPENSATION FOR IP-ENABLED SERVICES OR IP TRAFFIC?

A. This Commission should not adopt any provisions that would require the payment of access charges for IP-enabled services traffic exchanged between SBC and Level 3. The Commission should make clear that such traffic is required to be exchanged under the reciprocal compensation mechanisms established by Section 251(b)(5) of the Act. That is the only result that is permitted by Sections 251(b)(5) and 251(g) of the Communications Act, as well as the D.C. Circuit's decision in *Worldcom v. FCC*, 288

[85] *Local Competition Order*, ¶ 1042, concluding that "section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic"); and ¶ 1087, finding "[incumbent] LECs have used their unequal bargaining position to impose asymmetrical rates for CMRS providers and, in some instances, have charged CMRS providers origination as well as termination charges."

F.3d 429 (D.C. Cir. 2002). Moreover, it is the only result that is consistent with the FCC's interstate access charge rules, which for 20 years have classified information service providers as end users, not interexchange carriers, for the purposes of the FCC's access charge rules. SBC itself has conceded that IP-enabled service traffic is interstate, information services traffic. Accordingly, there is, in any event, no basis for assessing intrastate access charges on such traffic.

FX-LIKE TRAFFIC

Q. WHAT IS THE MAIN DISPUTE CONCERNING FX-LIKE TRAFFIC?

A. Level 3 and SBC have resolved one sub-issue of intercarrier compensation, namely, we have agreed to a rate of $0.0007 for all "local" and ISP-bound traffic. What the parties still disagree about, however, is what calls qualify for this $0.0007 compensation rate. Level 3 believes that all locally-dialed calls should qualify for this rate while SBC wishes to distinguish between locally-dialed calls based on the physical location of the called party.

Q. WHAT IS THE INTERCARRIER COMPENSATION TREATMENT OF FX-LIKE TRAFFIC UNDER THE PARTIES' CURRENT INTERCONNECTION AGREEMENT?

A. Under the current contract, Level 3 and SBC have been paying the same rate for all locally-dialed voice and ISP-bound traffic, regardless of the customer's physical location. *See* WPH-8 (Amendment to Level 3 Contracts Superseding Certain Compensation, Interconnection and Trunking Provisions, Section 4.1). At a time when the industry is moving toward a single, unified rate for all traffic, it makes no sense to reverse course and move FX-like traffic into a separate traffic category with a different rate. Under SBC's proposal, some locally-dialed calls would be subject to a rate of $0.0007 and

others subject to bill-and-keep. Rather than consolidating the current disparate rate categories, SBC would create yet another one. This is fundamentally at odds with the goal of policymakers — consolidating all traffic into a single termination rate.

Q. FROM A POLICY PERSPECTIVE, CAN YOU PLEASE EXPLAIN WHY LEVEL 3's POSITION ON FOREIGN EXCHANGE SERVICE SHOULD BE ADOPTED? [86]

A. Level 3's position should be adopted for at least five reasons.

First, calls are conventionally rated and routed across the United States based upon the NXX codes of the originating and terminating numbers. There is no reason to deviate from the existing numbering rules. The traffic that Level and SBC will exchange will be routed to the POI for local traffic and handed off just as any other local call would be. This practice should be continued such that calls between an originating and terminating NXX associated with the same local calling area are rated and routed as local.

Second, from a functional perspective, the services that Level 3 provides are no different from those that ILECs such as SBC have provided for years to their own foreign exchange customers. While the network architecture may be different and the scope of the service coverage wider, the functionality delivered from the customer's perspective is the same – the customer gets a telephone number in a serving area where the customer has no physical presence. The Commission should encourage, rather than discourage, this type of competition and service innovation.

Third, SBC's position is contrary to the efficient workings of a competitive telecommunications marketplace. As Mr. Gates explains, SBC's position penalizes

[86] See Issue DEF 21.

competitors for deploying different kinds of networks and imposes unnecessary costs that will frustrate the delivery of competitive services. SBC's response to a competitive foreign exchange product should not be to find creative ways to extend its cost recovery to its competitor, but to develop a competitive response that will win back customers.

Fourth, SBC's position discriminates against Level 3 vis-à-vis SBC's own operations and its treatment of other competitive local exchange carriers. Applying originating access charges to Level 3-delivered competitive responses to SBC FX services would be discriminatory and result in a regulatory-created advantage for SBC's services.

Fifth, SBC incurs no more cost in originating a call to a Level 3 FX-like service customer than SBC would incur in originating a call to a Level 3 customer who has a physical presence in the local calling area. The only costs SBC incurs are the transport and switching charges required to bring traffic to the POI between SBC and Level 3. These costs do not change based upon the location of Level 3's customers, so there is no economic justification for treating these calls differently from any other locally dialed call. SBC's position is based not upon cost recovery, but upon a desire to claim access revenue to which it is not entitled. As I discussed previously, the fact that SBC has historically enjoyed a revenue stream from above-cost access charges does not entitle them to apply those charges to new services.

In sum, a CLEC's foreign exchange number is the same service that ILECs such as SBC deliver to their own foreign exchange – albeit through what may be different technologies and network platforms – to respond to customer demand for local telephone numbers in different exchanges. If the Commission is going to direct Level 3 to pay

originating access to SBC for terminating foreign exchange calls from SBC's customers, then the Commission must direct all carriers, ILECs and CLECs alike, to pay originating access to the carrier whose customer originates the call to the terminating carrier's FX-like customer.[87] In other words, the Commission must ensure that SBC does not engage in any discriminatory, unfair, or anti-competitive practices.

Q. IS FX TRAFFIC CONSIDERED TO BE LOCAL TRAFFIC?

A. Yes. For rating and compensation purposes, FX traffic is treated as local. SBC rates and bills its customers based on the NXX codes of the calling and called party. If the call is rated as local, SBC bills its customer for a local call.

Q. WHY WOULD CUSTOMERS WANT TO BUY, AND CARRIERS WANT TO OFFER, FX-LIKE SERVICES?

A. Businesses want to buy FX-like services because it allows their customers to reach them without having to make a toll call. It also allows businesses to provide service in other areas before they have facilities or offices in those areas. For instance, FX-like services enable ISPs, among other customers, to offer local dial-up numbers throughout the state, including in more isolated, rural areas. Access to the Internet is affordable and readily available because these FX-like services allow ISPs to establish a small number of points of presence ("POPs") that can be reached by dialing a local number regardless of the physical location of the Internet subscriber.

Other organizations, such as the state government, may also want to make use of FX-like services to allow residents to contact state agencies without incurring the cost of a toll call. Such an arrangement would allow the state to provide services to taxpayers in

[87] *See* 47 U.S.C. §§ 201(a)-(b) and 252(a).

rural areas without building or renting space in those localities and without relocating employees. In sum, carriers provide FX-like services because customers demand them.

Q. DOES SBC OFFER FX SERVICE IN THIS STATE?

A. Yes.

Q. HOW DO YOU RESPOND TO THE CLAIM THAT LEVEL 3'S SERVICE IS DIFFERENT FROM TRADITIONAL FX IN THAT THE LATTER IS TYPICALLY OFFERED AS A RETAIL SERVICE OFFERING WITH A DEDICATED CONNECTION TO THE CALLED PARTY?

A. This comparison is based on a misunderstanding of the service and the nature of a call flow in a competitive, multi-provider environment. First, Level 3's service is a "retail service offering" offered to customers such as ISPs, which have long been treated as end user customers by the FCC.[88] Second, Level 3's service offers a "direct connection" to the customer – the call is delivered to the customer once it comes onto the Level 3 network, without going through any intermediate carrier. While it is true that Level 3 and SBC are both involved in routing the call between their customers, that is not a function of the way in which Level 3 provides FX-like service; rather, multi-provider routing is a function of a competitive telecommunications marketplace – *all* calls between competing carriers must be exchanged at the POI regardless of customer location. Any call from an SBC customer to a Level 3 customer – even if both customers were physically located in the same local calling area – would require that SBC and Level 3 both be involved.

SBC's proposed scenario of a "dedicated circuit" from the "home exchange" to the "foreign exchange" is flawed from a policy perspective because it locks the foreign exchange product into the network configuration offered by SBC and forces all other carriers to mirror that. One of the hallmarks of our experiment with a competitive telecommunications marketplace is that new entrants will be able to deploy the most

[88] See 47 C.F.R. 69.5

efficient network technology and architecture free of the historical constraints imposed by the SBC architecture. Adopting SBC's proposal would eviscerate that important policy goal by punishing economic and network efficiency. New entrants design networks differently, but that doesn't necessarily change the basic functionality delivered to customers. The Commission should reject any SBC suggestions to treat a FX-like service differently based upon the way in which a carrier's technology and/or network supports that service. It would be discriminatory to prohibit a service based solely upon the way in which a carrier provisions that service to its customers, and it is an artificial constraint that is not justified from an economic, public policy, or operational standpoint.

The New York Public Service Commission summarized this well in considering disputes between independent ILECs and CLECs with respect to ISP-bound foreign exchange-type calls. Specifically, the New York commission found that foreign exchange service should be defined "operationally, i.e., making local service possible in an exchange where the customer has no physical presence."[89] The New York commission further noted that an operational focus was more appropriate than a technological focus because "the architecture of new entrant networks will differ from that of incumbents and… CLECs need not replicate the incumbent's service offerings, rate centers, or customer mix."[90]

Q. HAS THE FCC WEIGHED IN ON COMPENSATION FOR FX-LIKE SERVICES?

A. Yes. The FCC issued a Notice of Proposed Rulemaking to overhaul the existing intercarrier compensation regimes and replace them with a single, unified intercarrier compensation regime. The FCC has identified the use of "virtual central office codes" as

[89] *In re AT&T*, Nos. 00-C-0789, 01-C-0181, 2001 WL 3082126, (N.Y.P.S.C., Sept. 07, 2001).

[90] *Id*.

an issue to be resolved in its rulemaking proceeding on such a unified intercarrier compensation regime.[91] Thus, the issue of the proper regulatory treatment of traffic using virtual central office codes ultimately will be addressed by the FCC. Until that time, however, this Commission retains the jurisdiction to determine, as it should, that voice calls using FX-like arrangements are eligible for reciprocal compensation under an interconnection agreement.

Q: HAS THE FCC LIMITED ITS ISP-BOUND COMPENSATION REGIME TO CALLS TO ISP MODEMS LOCATED WITHIN THE SAME LOCAL CALLING AREA AS THE CALLING PARTY?

A: No. As numerous state commissions have held, the FCC did not restrict its ISP-bound compensation regime to local calls between a calling party and ISP physically located in the same local calling area. We will include those decisions in our brief. Logically, however, it makes no sense to say that a locally-dialed call is jurisdictionally *interstate* and subject to the FCC's rate plan if the ISP's modem is located *in the same local calling area* as the calling party, but the same call is jurisdictionally *intrastate* and subject to *intrastate* access charges if the ISP's modem is located *outside that local calling area*.

In addition, it the *Core Forbearance Order*, the FCC determined that the Growth Cap and New Market Rules adopted in the *ISP Remand Order* (that imposed a bill and keep regime for some ISP-Bound traffic) "are no longer necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory."[92] In so doing, the FCC established a rate of $0.0007 per minute of use for the exchange of all locally-dialed ISP-Bound traffic. SBC's attempts to impose a different rate for certain

[91] *Id.* at ¶ 115.

[92] *FCC Core Forbearance Order*, ¶ 24.

calls based on the physical geographic location of the calling or called parties cannot be adopted.

Q. IS LEVEL 3 ASKING FOR A "FREE RIDE"?

A. No. There is no "free ride" at issue here. Service to a Level 3 customer that has established a "virtual" presence in a local calling area is, from a SBC network standpoint, indistinguishable from service to a Level 3 customer that has established a "physical" presence in a local calling area. SBC handles calls to either customer in the same manner and its costs are the same. Therefore, calls to either customer should be subject to the same regulatory treatment. That regulatory treatment calls for compensation to the terminating carrier, with the originating carrier being paid *by the customer who dialed the local call*.[93]

Regardless of where Level 3's customer is located, SBC routes the call precisely the same way: it is delivered to Level 3 at the POI and, from that point on, Level 3 incurs all the costs of transporting the call to its customer's location. It is SBC's responsibility to carry traffic to the POI that Level 3 has selected. That responsibility does not change if the called party has an FX-like service and, therefore, SBC incurs no additional cost. Level 3 assumes the financial responsibility for the traffic at the POI, regardless of the physical location of the terminating customer. These architecture issues are discussed in greater detail by Mr. Wilson.

[93] *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al*., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order (rel. Jun. 21, 2000) (*"TSR Wireless"*), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462, 468 (D.C. Cir. 2001); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶¶ 72, 112 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM")*.

Q. YOU STATED THAT LEVEL 3's SERVICE DOES NOT IMPOSE ANY ADDITIONAL COSTS ON ILEC. PLEASE EXPLAIN.

A. There is no additional cost incurred by SBC when a customer purchases a FX-like service from Level 3. From an interconnection perspective, SBC carries the call the same distance and incurs the same costs regardless of whether the call is terminated to a Level 3 customer with a physical location in the NXX rate center of the calling party, or to a Level 3 customer with a virtual presence. SBC's obligations and costs are therefore the same in delivering a call originated by one of its customers, regardless of whether the call terminates at a so-called "virtual" or "physical" NXX behind the Level 3 switch.

Q. WHAT IS LEVEL 3's RECOMMENDATION WITH RESPECT TO THIS ISSUE?

A. My recommendation is that the Commission rule that the LEC terminating FX-like voice traffic is entitled to cost-based reciprocal compensation for the termination functions it performs and that the originating LEC is not entitled to assess above-cost originating access charges. This conclusion is consistent with: (i) the way in which ILECs have historically handled their own exchange of FX-like traffic; (ii) federal intercarrier compensation rules; (iii) the goal of promoting a competitive telecommunications marketplace; and (iv) the goal of a fair and reasonable interconnection structure that compensates carriers only for additional costs.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.