RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION

ATTORNEYS AND COUNSELORS AT LAW

RECEIVED-FPSC ORIGINAL

01 JAN 10 PM 4:40

RECORDS AND REPORTING

STEPHEN A. ECENIA
JOHN R. ELLIS
KENNETH A. HOFFMAN
THOMAS W. KONRAD
MICHAEL G. MAIDA
MARTIN P. McDONNELL

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

J. STEPHEN MENTON
R. DAVID PRESCOTT
HAROLD F. X. PURNELL
GARY R. RUTLEDGE

GOVERNMENTAL CONSULTANTS
M. LANE STEPHENS

January 10, 2001

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket No. 000907-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Level 3 Communications, LLC ("Level 3") are the following documents:

1. Original and fifteen copies of Level 3's Posthearing Brief; and

2. A disk in Word Perfect 6.0 containing a copy of the Posthearing Brief.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

APP
CAF
CMP
COM
CTR
ECR
LEG 1
OPC
PAI
RGO
SEC 1
SER
OTH

KAH/rl
Enclosures
cc: Parties of Record

Level3\Bayo.

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

00460 JAN 10 ō

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of Level 3 Communications, LLC for arbitration of certain terms and conditions of proposed agreement with BellSouth Telecommunications, Inc.	)))))	Docket No. 000907-TP Filed January 10, 2001

LEVEL 3 COMMUNICATIONS, LLC'S POSTHEARING BRIEF

Kenneth A. Hoffman, Esq.
John R. Ellis, Esq.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302
(850) 681-6788 (Tel.)
(850) 681-6515 (Fax)

Russell M. Blau, Esq.
Tamar E. Finn, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 945-6917 (Tel.)
(202) 424-7645 (Fax)

Michael R. Romano
Level 3 Communications, LLC
1025 Eldorado Blvd
Broomfield, CO 80021
(720) 888-7015 (Tel.)
(720) 888-5134 (Fax)

LEVEL 3 COMMUNICATIONS, LLC'S POSTHEARING BRIEF

Level 3 Communications, LLC ("Level 3"), pursuant to Order No. PSC-00-2276-PHO-TP issued November 30, 2000, files its Posthearing Brief in this docket.

I. Basic Position

Level 3, an authorized alternative local exchange carrier ("ALEC") in the State of Florida, is interconnected with BellSouth in the Miami and Orlando Local Access and Transport Areas ("LATAs"). On February 14, 2000, Level 3 and BellSouth began negotiating a new interconnection agreement. The parties were able to resolve the vast majority of issues before Level 3 filed its arbitration petition with the Florida Public Service Commission ("Commission") requesting arbitration of eight specific disputes. Since then, Level 3 and BellSouth resolved three of the eight issues and withdrew them from the arbitration. At the hearing on December 6, 2000, the parties presented testimony on the five remaining issues.

The remaining issues can be divided into two categories – Interconnection and Compensation. Level 3 and BellSouth operate separate, and dramatically different, telecommunications networks in the State of Florida. In order for BellSouth customers to reach Level 3 customers and vice versa, Level 3 and BellSouth must link their networks for the exchange of local and intraLATA traffic. The Interconnection issues concern the linking of the networks at the Interconnection Point ("IP") and the financial responsibility for the facilities each party uses to transport its traffic to the IP. The Compensation issues concern the monetary payment each party should receive for terminating the other party's traffic.

A. Interconnection

Issue 1 relates to the number of IPs that each party must establish; *i.e.*, the number of points in each LATA at which they must exchange traffic. Increasing the number of IPs also increases the cost of the facilities needed for traffic exchange. All that the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), requires is a single IP per LATA. BellSouth, nonetheless, insists that it should be allowed to designate an *unlimited* number of IPs. As a compromise, and going beyond its obligations under the Act, Level 3 has proposed two alternative standards to govern the establishment of additional IPs in a LATA.

BellSouth has failed to meet its burden of showing that a single IP per LATA is not technically feasible, and has presented no cost evidence to show that a single IP per LATA is "expensive" and causes BellSouth to incur uncompensated costs. The Commission should therefore deny BellSouth's request to designate IPs in each local calling area for the delivery of its traffic to Level 3. Adopting BellSouth's position would not only violate Commission and Federal Communications Commission ("FCC") rules, it would also undermine the FCC's objective of permitting new entrants to pick the most efficient point at which to exchange traffic and hinder BellSouth's chances of receiving Section 271 interLATA authority. The Commission should permit Level 3 to select a single IP per LATA for the exchange of traffic with BellSouth or adopt one of Level 3's alternative standards.

The Commission should also reject BellSouth's fallback position (advocated in both Issues 1 and 3) that it is appropriate to charge Level 3 for trunks and facilities carrying BellSouth's *originating* traffic to the single IP. Under FCC Rule 51.703(b),[1] BellSouth may not charge Level 3 for transporting BellSouth's originated traffic over its own network. Furthermore, because BellSouth's contract language disputed in Issue 3 is so vague, the Commission should direct the parties to develop language that captures commitments BellSouth made during the hearing. Specifically, BellSouth should only be permitted to (1) charge Level 3 for trunks and facilities to the extent Level 3 uses BellSouth's trunks and facilities for Level 3-originated traffic and (2) charge Level 3 *either* the elemental common transport rates *or* the dedicated trunk and facility rates (to prevent double recovery). Finally, the Commission should clarify that all charges for trunk groups and facilities are included in the contract and specify that the trunk charges are interim and subject to true-up once the Commission completes its review of BellSouth's cost studies in Docket No. 990649-TP.

Issue 2 concerns the appropriate rate structure for dedicated facilities used by the terminating party to bring the other party's traffic to the destination end office. The facility that interconnects the parties' networks for this purpose is a dedicated pipe. BellSouth has proposed complex and confusing contract language that would result in asymmetric charges. Under BellSouth's proposal, the rates for the dedicated transport facility would depend on how many "wire centers" the circuit passes through. Since Level 3 operates only one "wire center" per LATA while BellSouth operates many, BellSouth could charge more than Level 3 for a facility between the same two points. BellSouth admitted at the hearing that it does not perform any different functions than Level 3 in

---

[1] 47 C.F.R. § 51.703(b). All citations hereinafter to "FCC Rule" refer to the corresponding section of 47 C.F.R.

providing a dedicated transport facility. The Commission should therefore adopt Level 3's position that regardless of who provides a dedicated interconnection facility, the price should be the same.

B. Compensation

There are also three compensation issues this Commission must resolve. First, in Issue 6, the Commission must determine whether traffic to Internet Service Providers ("ISPs") should be subject to reciprocal compensation as "local" traffic. In a recent arbitration proceeding, the Commission determined that the parties should compensate each other for ISP-bound traffic. Because ISPs purchase local service just like any other business customer, there are compelling economic and policy reasons to treat ISP-bound traffic as local traffic that is subject to the same rate as all other local calls. BellSouth has not presented cost evidence to support a lower compensation rate for ISP-bound traffic. The Commission should therefore reject BellSouth's invitation to either (1) preserve the BellSouth-claimed status quo of track and true-up or (2) set a lower rate for ISP-bound traffic. The Commission should order the parties to treat ISP-bound traffic as local traffic pending the outcome of the generic proceeding in Docket No. 000075-TP, just as BellSouth pays other ALECs today.

Issues 7A and 7B concern the intercarrier compensation due on foreign exchange-like traffic where the called party obtains a local telephone number in a calling area where it does not have a physical presence. Both parties provide customers the ability to obtain "foreign" local numbers – BellSouth through services such as foreign exchange ("FX") and Level 3 through so-called "virtual NXX" service. BellSouth rates these calls as local for retail purposes, routes them as local for interconnection purposes, and, to date, has charged ALECs reciprocal compensation for terminating these calls. Although it now says it is trying to develop a method to segregate FX calls from other locally-dialed traffic, even BellSouth does not expect to develop an interim solution until February1, 2001 (having started many months before).

Recognizing the broad implications of BellSouth's position, the Commission has included this issue in its generic proceeding in Docket No. 000075-TP. Based on the evidence presented in this proceeding and pending a determination in the generic proceeding, Level 3 recommends that the Commission order the parties to pay reciprocal compensation on all locally-dialed calls, regardless of the physical location of the called customer, and prohibit either party from imposing access charges for the origination of such calls.

II. Issues of Fact, Law and Policy

A. Issue A: What is the Commission's jurisdiction in this matter?

Level 3: ******The Commission has jurisdiction to arbitrate Issues 1-3, 6, 7A, and 7B as set forth in Level 3's Petition for Arbitration, and clarified in the Order Establishing Procedure, pursuant to Section 252 of the Act and Section 364.01 Florida Statutes.******

B. Issue 1: How should the parties designate the Interconnection Points (IPs) for their networks?

Level 3: ******The parties should establish a single, initial IP per LATA for the exchange of all traffic and additional IPs where traffic exchanged at a BellSouth tandem exceeds an OC-12. The Act gives Level 3 the right to select a single, technically feasible IP per LATA regardless of BellSouth's alleged economic burdens.******

Issue 1 can be broken down into two questions. First, may BellSouth designate a separate IP for its originating traffic or require an IP in each local calling area? The answer is no. Second, if Level 3 designates a single IP per LATA for the exchange of traffic, may BellSouth charge Level 3 for facilities used to carry BellSouth's originating traffic from each local calling area to the IP? Again, the answer is no.

1. BellSouth May Not Designate a Separate IP for Its Originating Traffic

The Act grants ALECs, not incumbent LECs ("ILECs") the right to select the IP for the exchange of both parties' traffic. Under 47 U.S.C. § 251(c)(2)(B), BellSouth must provide interconnection at "any technically feasible point" within its network selected by Level 3. This means that Level 3 has the right to select a single IP per LATA,[2] just as the Commission ordered during BellSouth's arbitration with Sprint.[3] Furthermore, the FCC has specified that to qualify for Section 271 interLATA relief, an ILEC must offer a single IP per LATA.[4] By contrast, there is nothing in the Act that imposes any similar requirement on ALECs.

Under FCC Rule 51.305(e), BellSouth bears the burden of showing that Level 3's requested IP is not technically feasible. BellSouth has not even tried to meet its burden. To the contrary, since the parties are using a single IP per LATA in Florida (Tr. 96-7), there is "substantial evidence" under FCC Rule 51.305(c) that it is technically feasible for BellSouth to deliver its originating traffic to a single IP. In other words, BellSouth routes traffic to Level 3 today in the same manner that it complains about in Exhibit 6 (Tr. 133, Ex. 6: Local Call from BellSouth End User with IP in Different Local Calling Area), and none of BellSouth's local network planners has ever complained about this arrangement. (Tr. 97)

---

[2] *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 78 (rel. Jun. 30, 2000) (*"Texas 271"*); *U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222 WD, 1998 WL 350588 (W.D. Wa. 1998), *aff'd U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1124 (9th Cir. 1999); *US West Communications, Inc. v. Minnesota Public Utilities Commission, et al.*, No. Civ. 97-913 ADM/AJB, 1999 U.S. Dist. LEXIS 22042, ** 52-6 (D. Minn. 1999).

[3] Order No. PSC-97-0122-FOF-TP at 9.

[4] *Texas 271* at ¶ 78.

Moreover, under the standard of "technical feasibility," the alleged economic burden to BellSouth is not relevant to the issue of locating the IP. As the FCC found, "the 1996 Act bars consideration of costs in determining 'technically feasible' points of interconnection" and that prohibition "cannot be undone through an interpretation that such considerations are implicit."[5] Under binding FCC rules, unless BellSouth can show that the exchange of traffic at a single IP per LATA is not technically feasible, it must offer such interconnection to Level 3.[6] BellSouth has failed to meet its burden, especially since the parties' current interconnection arrangements prove that Level 3's requested form of interconnection is technically feasible.[7]

BellSouth asserts that nothing in the Act or FCC rules prevents BellSouth from designating IPs for its own originated traffic. When asked to point to authority in support of BellSouth's position, Ms. Cox cited the absence of a restriction. (Tr. 461) In fact, however, there is a restriction. The FCC has found that each ALEC may select the most efficient IP at which to *exchange* traffic with an ILEC, which restricts the incumbent from requiring that traffic be exchanged at a different point.[8] This Commission, in the recent BellSouth arbitration with Intermedia, agreed that at the IP,

---

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶198 (1996) *("Local Competition Order"), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1069 (9th Cir. 1997) and *Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721 (1999), *vacated in part on remand, Iowa Utils. Bd. v FCC*, 219 F.3d 744 (8th Cir. 2000), *motion for partial stay granted, Iowa Utils. Bd. v. FCC,* Case no. 96-3321 et al., Order Granting Motion for Partial Stay of the Mandate (8th Cir. Sept. 22, 2000).

[6] *Local Competition Order* at ¶ 198, 205.

[7] *Id.* at ¶ 204.

[8] *Id.* at ¶ 172.

"traffic is mutually exchanged between carriers."[9] In addition, the FCC rejected a similar proposal by Bell Atlantic:

> Fi: :ly, as discussed below, we reject Bell Atlantic's suggestion that we impose reciprocal terms and conditions on incumbent LECs and requesting carriers pursuant to section 251(c)(2). Section 251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. The obligations of LECs that are not incumbent LECs are generally governed by sections 251(a) and (b), not section 251(c). Also, the statute itself imposes different obligations on incumbent LECs and other LECs (i.e., section 251(b) imposes obligations on all LECs while section 251(c) obligations are imposed only on incumbent LECs).[10]

In rejecting various proposals about ILECs designating separate IPs, the FCC again affirmed an ALEC's right to *exchange* traffic with the ILEC at a single IP:

> Of course, requesting carriers have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under section 251(c)(2).[11]

As a new entrant in Florida's local exchange market that is just beginning to deploy its network, Level 3 is the type of carrier the FCC's rules are meant to protect. Unlike BellSouth, who has ubiquitous facilities throughout its service area, Level 3 must construct of purchase facilities to reach each IP. (Tr. 94) Accepting BellSouth's economic argument and requiring Level 3 to purchase facilities to each BellSouth local calling area would make establishment of a single IP meaningless. (Tr. 240)

While the default rule permits ALECs to designate the IP for the exchange of both parties' traffic, ALECs nevertheless have a duty to negotiate in good faith when ILECs request additional IPs. Level 3 has met that duty by offering two compromise proposals to govern the establishment

---

9 Order No. PSC-00-1519-FOF-TP at 48.

10 *Local Competition Order* at ¶ 220.

11 *Id.* at ¶ 220, n. 464 (footnotes omitted).

of additional IPs. Under Level 3's proposal, BellSouth could either designate any technically feasible IP on Level 3's network (Tr. 103, 142), or the parties could use a traffic volume threshold to determine when additional IPs are necessary. (Tr. 101-2) Under the traffic threshold option, the contract would require the establishment of additional IPs once traffic originating from and/or terminating to BellSouth customers served by a BellSouth access tandem reached an OC-12. (Tr. 101-2)

Contrary to FCC rules and sound engineering principles, BellSouth's proposal would foist inefficient costs on new entrants by forcing them to mirror the BellSouth network. When asked what impact BellSouth's designation of multiple IPs would have on ALECs, Ms. Cox responded that it would be feasible, if not practical, for ALECs to build their own facilities to each local calling area. (Tr. 472) She also admitted that nothing in the contract limits BellSouth to establishing one IP per local calling area or prevents BellSouth from establishing an IP in a local calling area where Level 3 serves no customers. (Tr. 461, 463-4) As Mr. Sachetti testified, deploying facilities can be an expensive, time consuming process. (Tr. 101) Furthermore, using BellSouth's facilities could impose additional, unnecessary costs on Level 3 as trunk groups are transitioned from a single IP to multiple IPs and interfere with Level 3's operations during the transition. (Tr. 98-99) Nor would an ALEC be able to justify the cost of building such facilities to carry a minimal amount of traffic from the local calling area to the IP. (Tr. 234-5) Thus BellSouth's "build or buy from BellSouth" option is not really an option at all; it foists additional, unnecessary costs on its competitor, Level 3, and creates a financial windfall for BellSouth. (Tr. 116)

BellSouth operates an ubiquitous, integrated network capable of carrying its customers' local and long distance voice, video, and data services traffic. (Tr. 112) Under the Act and binding FCC rules, BellSouth must permit Level 3 to select a single, technically feasible point to interconnect with BellSouth's integrated network.

2. FCC Rules Prohibit BellSouth from Charging Level 3 for Delivery of BellSouth's Traffic to a Single IP

a. As the Originating Carrier, BellSouth Must Bear the Costs of Delivering Its Local Traffic to the IP

The FCC has established "rules of the road" that address BellSouth's financial obligation to deliver its originating traffic to the IP selected by Level 3, rather than charging Level 3 for such facilities. As discussed above, the first rule is that Level 3 is entitled to select a single IP in a LATA for the exchange of traffic with BellSouth. The second rule is that each LEC bears the burden of delivering local traffic originated by its customers to the IP and recovers such costs in the rates charged to its end users.

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and <u>is responsible for paying the cost of delivering the call to the network of the co-carrier</u> who will then terminate the call. Under the Commission's regulations, <u>the cost of the facilities used to deliver this traffic is the originating carrier's responsibility</u>, because these facilities are part of the originating carrier's network. <u>The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.</u> This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[12]

If Level 3 selects (or the Commission orders) a single IP per LATA for the exchange of traffic, BellSouth has an equally problematic fallback position. Instead of requiring Level 3 to build facilities from the IP to each local calling area, BellSouth proposes to charge Level 3 for a dedicated

---

[12] *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, FCC 00-194, ¶ 34 (rel. June 21, 2000) *("TSR Wireless")* (emphasis added).

facility from the local calling area to the single IP -- even if only a trickle of traffic is coming from that local calling area. (Tr. 464) However, as Mr. Gates testified, requiring Level 3 to buy or build facilities from each local calling area to the IP violates the first FCC rule by eliminating the meaning of a single IP per LATA. (Tr. 332) Under BellSouth's proposal, if the parties exchange five calls, each of 20 minutes duration, over six months, BellSouth would avoid $0.0012[13] in common transport costs but impose $3124.80[14] in "appropriate" (Tr. 435) dedicated transport costs on Level 3. Although BellSouth would not have Level 3 build its own facilities until traffic volumes justify the expense, BellSouth has no qualms about charging Level 3 for inefficiently utilized dedicated BellSouth facilities. (Tr. 116)

BellSouth has alleged that interconnection in each local calling area is required because its local rates do not cover the costs of delivering its customers' traffic to a single IP. Yet Ms. Cox could not point to record evidence in support of that allegation. (Tr. 468) Indeed, this statement is contrary to the FCC "rules of the road" quoted above. In addition, as Mr. Gates testified, BellSouth's network costs are not covered by BellSouth's local rates alone, but also the subscriber line charge, revenue from vertical services, universal service subsidies that might apply, and other subsidies, such as access charges. (Tr. 272) Thus BellSouth has failed to meet its burden of showing it is entitled to compensation for transport from each local calling area to the single IP.

---

[13] This figure assumes one mile of transport and common transport per minute of $.000012. Order No. PSC-96-1579-TP.

[14] This figure assumes one mile of transport, and adds the non-recurring charges set forth in Mr. Sachetti's testimony plus six times the monthly recurring charges, which totals $3124.80. (Sachetti Direct at 12)

b. BellSouth's Financial Obligation to Deliver Its Originating Traffic to Level 3's Selected IP Is Not Conditioned on Level 3 Accepting Such Traffic Within the Local Calling Area in Which It Originated

FCC Rule 51.703(b) establishes that a "LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." This rule, when read in conjunction with Rule 51.305, establishes that a LEC must deliver its originating local telecommunications traffic to a single IP per LATA at no charge to the terminating carrier, and must pay reciprocal compensation to the terminating carrier for accepting local traffic at the IP and completing those calls.

The rule cited by BellSouth in support of its purported right to charge for facilities carrying BellSouth's originating traffic from each local calling area says no such thing. FCC Rule 51.701(b)(1), contrary to BellSouth's claims, does not state that local traffic must be exchanged in the local calling area. (Tr. 87-88) Local telecommunications traffic between wireline carriers is defined in Rule 51.701(b) as traffic that originates and terminates within a local service area. The definition determines the *type* of traffic that must be brought to the IP, not the location of the IP. In other words, although interexchange carriers must pay BellSouth for originating a long distance call, LECs are not required to pay BellSouth for originating a local call. Whether the handoff of traffic between carriers happens within or outside of the local calling area does not change a local call into a long distance call, nor does the location of the traffic exchange within the LATA relieve BellSouth of its Rule 51.703(b) obligation to pay for delivering this local telecommunications traffic to its IP with Level 3. (Tr. 377) (Indeed, if the handoff of traffic outside of the local calling area changed the nature of the call, no call being traded between BellSouth and ALECs to date under MCI agreement's single IP architecture, which Level 3 adopted, would ever be a local call)

BellSouth stretches to link the local calling area definition to a requirement to locate the IP in that local calling area by analogy to the FCC's *TSR Wireless* order. In *TSR Wireless*, the FCC found that an ILEC had the obligation to take a call to an IP anywhere in a Major Trading Area ("MTA") without charge for interconnection with a wireless carrier. A MTA can be as large as, if not larger than, a LATA, and typically encompasses parts of several states. (Tr. 87) Under BellSouth's interpretation of *TSR Wireless*, BellSouth would be required to bear the costs of hauling its customers' local calls all over the LATA for wireless carriers but not for wireline carriers.[15] (Tr. 462) The FCC has emphasized, even in *TSR Wireless*, that its rules are designed to be technology neutral.[16] Because BellSouth's reading of *TSR Wireless* discriminates against wireline carriers, the Commission should reject it. *TSR Wireless* must be read in conjunction with both the type of traffic exchanged at the IP (local telecommunications) and the obligation to establish a single IP per LATA. FCC rules require BellSouth to bear the costs of delivering its originating local telecommunications traffic to its single IP with Level 3 in the LATA. Nothing in Rule 51.701(b) or *TSR Wireless* requires establishment of the IP in a local calling area.[17] (Tr. 87-88)

---

[15] It is also noteworthy that the FCC found in *TSR Wireless* that the LEC's costs of hauling a call anywhere within a MTA were covered by the local service rates paid by its customer. *TSR Wireless* at ¶ 34. If a LEC's costs are already covered for hauling traffic anywhere within a MTA, and a MTA is larger than a LATA, simple logic dictates that the LEC's costs of hauling a call anywhere within a LATA are covered by its local service rates as well. Thus BellSouth's claims that its local service rates do not cover the cost of taking a call to the single IP are groundless.

[16] *TSR Wireless* at ¶ 23.

[17] Nor, given the FCC's numerous pronouncements concerning an ALEC's right to establish a single IP per LATA, can any silence in Rule 51.701(b) regarding the location of the IP support BellSouth's position.

c. <u>BellSouth Has Failed to Show that a Single IP Per LATA Is "Expensive"</u>

In addition to its misplaced reliance on *TSR Wireless*, BellSouth's second, and equally unconvincing, theory in support of charging Level 3 for originating traffic is that paragraphs 199 and 209 of the *Local Competition Order* require Level 3 to pay for the "additional costs" BellSouth purportedly incurs by interconnecting with Level 3 at a single physical IP in each LATA. (Tr. 439) Under BellSouth's theory, the facilities used to haul BellSouth-originated traffic from a local calling area to the single IP are "additional costs."

The "costs" BellSouth incurs to exchange traffic with Level 3 are the result of BellSouth's historic network design, its continued monopoly share of local service customers in Florida, the need to interconnect competitive networks to introduce competition, the demands of its own customers, and the specific network interconnection architecture mandated by the FCC or agreed to by BellSouth and Level 3 As Ms. Cox acknowledges, BellSouth has not presented evidence to establish what, if any, "additional" costs BellSouth incurs using a single IP per LATA as opposed to an IP in each local calling area. (Tr. 464-6) BellSouth has not submitted cost studies regarding interconnection with Level 3, nor has it submitted evidence concerning historical or projected traffic patterns between BellSouth and Level 3 necessary to evaluate its alleged transport costs. (Tr. 464) In short, BellSouth has failed to make any cost-based showing that interconnection at a single IP per LATA causes BellSouth to incur any uncompensated costs. Rather, BellSouth has argued that a single IP per LATA is *per se* "expensive."

Further undermining BellSouth's "additional costs" claims, Ms. Cox could provide no criteria for the Commission to apply in evaluating whether a single IP architecture is expensive. (Tr.

465) As Mr. Rogers testified, interconnection at a single IP per LATA is not novel; it is required by FCC rules. (Tr. 63) An ALEC's request for a single IP per LATA does not *per se* impose additional costs an ILEC is entitled to recover by requiring an IP in each local calling area. As a federal court determined in reviewing a recent Minnesota arbitration in which the same issue arose:

> The MPUC expressly found that US West failed to meet its burden of showing that it would be technically infeasible for US West to provide a single point of interconnection per LATA overruling US West's argument that such a requirement would raise costs and lower network efficiency. The MPUC did not act in an arbitrary or capricious manner in reaching this conclusion. The FCC concluded that an increase in costs does not impact upon the determination of technical feasibility, 47 C.F.R. 51.5, and therefore US West's argument of enhanced costs is inapposite.[18]

If, as BellSouth claims, interconnection at a single IP per LATA causes BellSouth to incur additional costs, BellSouth must prove what those costs are under Section 252(d)(1) and must show that it does not recover such costs from its own customers. BellSouth has failed to meet its burden.

d. Both Parties and Their Customers Benefit from Interconnection

Contrary to BellSouth's repeated allegations, Level 3 is not asking BellSouth to bear the costs of Level 3's network design. Level 3 is asking BellSouth to bear the burden of serving *BellSouth's customers* in a competitive market. Both Congress and the FCC recognized that ILECs would have to make modifications to their networks to open the local exchange market to competition. (Tr. 56-9) Both Congress and the FCC also anticipated the introduction of new technologies and network architectures and crafted rules so as not to *penalize* competitive carriers that seek to provide innovative networks and/or technologies.[19] Imposing the cost of interconnecting

---

[18] *US West Communications, Inc. v. Minnesota Public Utilities Commission et al.*, 1999 U.S. Dist. LEXIS 22042 at *53 (citations omitted).

[19] *See*, Rogers' discussion (Tr. 58-60) of the "comparable service" and "equivalent facility" definitions adopted by Congress and the FCC, respectively.

different network designs solely on ALECs defeats the policy of encouraging network innovation and ignores the fact that BellSouth's own customers cause BellSouth to incur the cost of delivering traffic to Level 3. (Tr. 56) BellSouth should not be allowed to use its historic network design as an excuse to prevent Level 3 from selecting a technically feasible IP. If BellSouth is permitted to require Level 3 to establish an IP in each local calling area, the Commission would be undermining Congressional and FCC intent to promote competition and innovation in network design.

C. Issue 2: Under what circumstances is Level 3 entitled to symmetrical compensation for leased facility interconnection?

Level 3: ******If Level 3 provides trunks and facilities to carry traffic between two points, Level 3 should charge the same amount BellSouth charges Level 3 for traffic on the same route. The price should not vary based on the mere existence of BellSouth's wire center that performs no function.******

This issue concerns rates for dedicated facilities on the terminating party's network that carry the other carrier's originated traffic to the end office switching destination. The genesis of this dispute lies in the fact that each party has deployed a different network configuration. BellSouth's network has many wire centers, containing many end office switches that are interconnected by a network of tandem switches. Level 3's network uses a single "wire center" containing a single switch and longer transport to serve an area that BellSouth serves using multiple switches. (Tr. 161-2) As both Mr. Gates (Tr. 160) and Ms. Cox (Tr. 485-486) testified, BellSouth has broken up a leased facility used for interconnection into two rate elements. However, the convoluted contractual definition proposed by BellSouth makes the rates for this leased facility depend on the location of the providing party's "wire center." As a result, a party can charge *both* dedicated transport rate elements *only* if the party has deployed multiple switches in the LATA -- even if those switches play no part in the function of the dedicated transport at issue here.

BellSouth's proposal is blatantly discriminatory, and is not cost-based since it bases the rates for a *non-switched* service on the location of a party's switches. Rather than trying to redefine the rate elements for both carriers, Level 3 proposed language to ensure that each carrier charges for the length of dedicated transport it provides, regardless of where in the network such transport is located.

Under BellSouth's proposal, the local channel facility ("LCF") rate element is flat-rated and the dedicated interoffice transport facility ("DIT") rate element is mileage-sensitive. Ms. Cox testified that both LCF and DIT are dedicated transport facilities. (Tr. 379-80) She is aware of no difference in the functions performed by these facilities. (Tr. 380) When asked what function the BellSouth wire center in the middle of the LCF and DIT provides, Ms. Cox could think of none. (Tr. 487) To the contrary, as Mr. Gates explained, "the serving wire center plays absolutely no part in the dedicated trunk. It's literally dedicated; it's not switched. So it just goes right through the serving wire center." (Tr. 381) Yet based on definitions of LCF and DIT, under the hypothetical posed by BellSouth's attorney,[20] BellSouth wants to charge Level 3 12 cents per month for a 12-mile leased facility used for interconnection and restrict Level 3 to charging one cent per month for the same 12-mile leased facility. (Tr. 381)

Level 3 is not seeking compensation for anything it is not providing. (Tr. 363) Level 3 is seeking symmetrical compensation for providing the same 12 miles of dedicated transport that BellSouth receives from providing 12 miles of dedicated transport. (Tr. 364) The Commission should adopt Level 3's position that regardless of who provides the dedicated facility, the price should be the same based on the length of the facility.

---

[20] Of course, the actual rates for dedicated high-capacity circuits are several orders of magnitude greater than these hypothetical rates. *See* Tr. 103.

D. Issue 3: Should each party be required to pay for the use of interconnection trunks on the other party's network? If so, what rates should apply?

Level 3: ******Each party should bear the cost of facilities to deliver its originating traffic to the IP. If an originating party purchases dedicated transport from the terminating party behind the IP, the originating party should pay for the trunks and facilities it uses in lieu of per minute reciprocal compensation rates.******

This issue arises from BellSouth's vague contract language that appears to give BellSouth unfettered discretion to charge Level 3 for the trunks and facilities used to carry any traffic exchanged with Level 3 – regardless of whether that traffic is originated by Level 3 or BellSouth customers.

> Charges, both non-recurring and recurring, associated with interconnecting trunk groups between BellSouth and Level 3 are set forth in Exhibit A. To the extent a rate associated with the interconnecting trunk group is not set forth in Exhibit A, the interim rate shall be as set forth in the appropriate BellSouth tariff for Switched Access services. Once a cost-based rate is established by BellSouth, the interim tariff rate shall be trued up and the cost based rate will be applied retroactively to the effective date of this agreement.[21]

"Interconnecting trunk groups" is not a defined term in the contract and could apply to leased facilities used for interconnection and/or the facilities used by either party on their respective side of the IP. Furthermore, this language does not clarify whether Party A may charge Party B for trunks and facilities used to carry only Party B's originating traffic, or the trunks and facilities used to carry all traffic exchanged between the parties. As Level 3 explained in detail in its discussion of Issue 1 above, under FCC rules, BellSouth is financially obligated to pay for the trunks and facilities needed to bring its originating traffic to the IP selected by Level 3. Thus, this portion of the dispute in Issue 3 will be resolved by the Commission's resolution of Issue 1.

---

[21] Ex. 14 (Level 3 Petition, Exhibit B, Attachment 3, Section 2.5).

As Mr. Gates testified, interconnecting trunk groups are valuable to both parties. For each trunk BellSouth sets up on its side of the IP, Level 3 must deploy matching capacity on its side of the IP to ensure that calls are not blocked. (Tr. 169) Because both parties must deploy matching capacity on their respective sides of the IP, Ms. Cox admitted it is possible that the non-recurring trunk group charges could cancel each other out. (Tr. 482-3) This would result in a situation where the carriers would owe one another nothing for setting up trunks. Because these trunks benefit both parties, Level 3 urges the Commission to adopt Level 3's position and find that each party is financially responsible for the trunks and facilities on its side of the IP.

Alternatively, if the Commission determines that charges are appropriate, it must at least direct the parties to make clear what facilities are covered by these charges. In this regard, there are two aspects of Issue 3 on which the parties appear to agree. First, subject to BellSouth's position that the IP should be in the local calling area, Ms. Cox agreed that BellSouth should only be permitted to charge Level 3 for trunks and facilities to the extent Level 3 uses them for *Level 3's originating traffic*. In other words, Level 3 should be charged for one-way trunks and facilities that carry its originating traffic and should be charged a share of two-way trunks and facilities proportionate to the extent those trunks and facilities carry Level 3's originating traffic. (Tr. 475-6) Second, Ms. Cox also acknowledged that BellSouth is not trying to over-recover its costs for the termination functions BellSouth performs after accepting Level 3-originated traffic at the IP. Rather, Ms. Cox said that Level 3 has two options for transport and termination of Level 3-originated traffic. Level 3 may either purchase dedicated transport and pay for dedicated trunks and facilities or it may purchase common transport, and not pay for trunks and facilities. (Tr. 477-81, 522)

Finally, Ms. Cox testified that BellSouth has included in the contract the prices it proposed in a separate proceeding to establish cost-based trunk rates. (Tr. 436) Because all prices associated with interconnecting trunk groups have now been included in the contract, there is no longer any need to refer to BellSouth's access tariff. Rather, the true-up language should reference the proposed trunk charges that have not been approved by the Commission. If the Commission determines that trunk group charges are appropriate, Level 3 recommends the following clarifications to Attachment 3 based on the admissions Ms. Cox made at the hearing:

> 2.5 All non-recurring charges for trunk groups, and non-recurring and recurring charges for facilities that carry the trunk groups, are set forth in Exhibit A. The trunk group rates are interim and subject to true-up once a cost-based rate is established by the Commission. The terminating Party may charge trunk and facility charges or common transport charges, but not both, for carrying the originating Party's traffic from the IP to the End Office. A Party may not charge the other Party for trunks and facilities used to carry traffic originated by the charging Party.
>
> 2.6 For two-way trunk groups that carry both Parties' local and IntraLATA Toll traffic only, the Party providing the trunks and facilities shall receive compensation under Section 2.5 in proportion to the relative use of the trunks and facilities for each Party's originating traffic. Level 3 shall be responsible for ordering and paying for any two-way trunks carrying Transit Traffic.

E. Issue 6: For purposes of the interconnection agreement between Level 3 and BellSouth, should ISP-bound traffic be treated as local traffic for the purposes of reciprocal compensation, or should it be otherwise compensated?

Level 3: ****** Consistent with public policy, economic objectives, this Commission's prior decisions, and the decision of the D.C. Circuit Court of Appeals reversing and remanding portions of the FCC's Declaratory Ruling, BellSouth should pay Level 3 reciprocal compensation for ISP-bound traffic at the same rates for all other local traffic.******

1. The Commission Should Require the Parties to Compensate Each Other for Local Calls to ISPs

A fundamental purpose of the 1996 Act is to open local exchange markets to competition. In several sections of the Act, Congress set out responsibilities that ILECs and ALECs have to each other, including the obligation to put in place a system under which interconnecting LECs compensate each other for the use of their networks to transport and terminate local calls. 47 U.S.C. § 251(b)(5). The payment of reciprocal compensation between carriers reflects the fact that the originating carrier is making use of the terminating carrier's facilities rather than having to invest in those facilities itself. (Tr. 202-3) Reciprocal compensation allows the terminating carrier to recover the costs associated with carrying and terminating traffic originated by the local customer of an interconnected carrier.

After the majority of state commissions decided that ISP-bound traffic should be subject to reciprocal compensation payments, the FCC issued a Declaratory Ruling in February 1999 (Docket 99-68) finding that jurisdictionally ISP-bound traffic is primarily interstate in nature and that the communications do not "terminate" at the ISP's point of presence in the local calling area. The FCC also indicated to state commissions that pending the outcome of the further rulemaking it was appropriate to treat ISP-bound traffic "as if it were local traffic" for purposes of intercarrier compensation.

The D.C. Circuit issued an opinion on March 24, 2000 vacating the FCC's Declaratory Ruling and remanding the issue back to the FCC for further deliberations. The primary rationale of the Co irt's opinion reinforces the Commission's past and present treatment of ISP-bound traffic as local:

> Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] . . . local telecommunications traffic," and why such traffic is "exchange access" rather than

> "telephone exchange service," we vacate the ruling and remand the case to the [FCC].[22]

This confirms the long-standing treatment of calls to ISPs as local for a variety of regulatory purposes. The Court rejected the FCC's decision to treat ISP-bound traffic as interstate given the *differences* that exist between ISPs and interstate long distance carriers, and the *similarities* that exist between ISPs and other businesses that use communications services to provide goods and services to their customers. The Court agreed with the ALEC argument that an ISP appears "no different from many businesses, such as . . . travel reservation agencies, credit card verification firms, or taxi cab companies," and other "communications-intensive business end user[s] selling a product to other consumer and business end-users."[23] The Court's rationale highlights the fact that state commissions should continue to treat ISP-bound traffic as local calls. Indeed, this Commission has taken the position in comments filed with the FCC that ISP-bound calls terminate at the ISP's local server and are not interstate in nature.[24]

BellSouth's position is based on the fallacy that ISP-bound calls should be treated differently from other types of local calls. FCC rules prohibit the practice urged by BellSouth. Specifically, FCC Rule 51.503(c) provides: "[t]he rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services

---

[22] *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. March 24, 2000).

[23] *Bell Atlantic* at 9.

[24] See Florida Public Service Commission Comments on Public Notice dated July 21, 2000 and filed in FCC Docket No. 99-68, Inter-Carrier Compensation for ISP-Bound Traffic. (Listed on Ex. 1: Level 3's Official Recognition List).

that the requesting carrier purchasing such elements uses them to provide."[25] To create a distinction in what LECs may charge one another based upon the kind of customer involved would discriminate against a particular class of customers or type of service being provided, based on something other than cost. Such discrimination is not in the public interest and is prohibited under FCC rules. BellSouth has not provided any rational reason for singling out data traffic, and there are several economic and policy reasons why the Commission should not establish a class of service distinction for ISP-bound traffic.

Because of the FCC's access charge exemption, ISPs purchase local service just as any other business customer.[26] ISP-bound traffic uses the same public switched network facilities used by other local calls. Likewise, the costs to carry ISP-bound traffic are largely identical to other local calls exhibiting similar calling characteristics (*i.e.*, time of day, duration, etc.). Denying reciprocal compensation for ISP-bound traffic would therefore cause Level 3 to carry large volumes of BellSouth traffic with no compensation. (Tr. 208)

BellSouth's artificial distinction between these two types of calls (*i.e.*, ISP-bound calls and other local calls) would also skew the resource allocation decisions of residential and business customers, resulting in inefficient decision-making by local callers. Specifically, the distinction skews the consumer's economic decision-making as to what volume of each type of call to consume (*i.e.*, if prices for Internet-bound calling are higher than for other types of local calling, the consumer

---

[25] 47 C.F.R. § 51.503(c).

[26] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-158, 12 FCC Rcd 15982, ¶¶ 344-7 (rel. May 16, 1997).

will suppress his/her demand for Internet calling in comparison to the level demanded absent such a price differentiation). (Tr. 180-1)

Separating ISP-bound traffic from all other types of local-billed traffic and subjecting only ISP traffic to this system will depress demand for Internet usage and provide incentives to "over-use" voice grade local calling. In essence, BellSouth is asking the Commission to use its regulatory authority to favor one type of local-billed traffic (voice traffic) over another type of local-billed traffic (ISP-bound traffic). This would cause market distortions that could have long-term effects on the growth of Internet traffic and the efficient allocation of resources to Florida's telecommunications infrastructure. (Tr. 181-3) One such unfortunate result could be an increase in the gap between those consumers who can afford to use the Internet at these artificially higher rates, and those that cannot (the so-called "digital divide"). To the extent BellSouth's proposal to distinguish Internet usage from other local usage depresses demand for Internet usage, it is not in the public interest. BellSouth's ill-conceived proposal should therefore be rejected.

In the BellSouth/Global Naps arbitration, the Commission found that "it is appropriate to treat ISP-bound traffic as local in order to provide for compensation."[27] In that case, the Commission rejected BellSouth's track and true-up option because it could result in no compensation for ISP-bound traffic for an extended amount of time. The Commission also rejected BellSouth's bill and keep argument because ISP-bound traffic is not in balance. Like Global Naps, Level 3 could be forced to incur costs without compensation under a track and true-up or bill and

[27] Order No. PSC-00-1680-FOF-TP.

keep mechanism for ISP-bound traffic. The Commission should therefore order the parties to compensate each other for ISP-bound traffic.

The Commission should also reject BellSouth's invitation to maintain the status quo for ISP-bound traffic based on the *Intermedia* decision. Although Ms. Cox does not know if BellSouth is paying Intermedia reciprocal compensation for ISP-bound traffic, she did admit that BellSouth is paying at least some ALECs for such traffic. (Tr. 490) This Commission, in a complaint case, ordered BellSouth to resume reciprocal compensation payments for ISP-bound calls in accordance with its interconnection agreement with WorldCom (formerly MCI).[28] Although Level 3 adopted the MCI contract, BellSouth is not paying Level 3. (Tr. 490-1) Therefore, as Ms. Cox testified, BellSouth believes the status quo is to continue tracking ISP-bound traffic with no payment. (Tr. 491) It would be discriminatory to require BellSouth to pay other ALECs for such traffic but permit BellSouth to escape paying Level 3. (Tr. 349) Level 3 therefore asks that the Commission order reciprocal compensation for locally-dialed, ISP-bound traffic under the new agreement. The Commission should use the generic proceeding to determine the long-term treatment of this traffic and whether any true-up back to the effective date of the new agreement is appropriate. (Tr. 245)

2. There Is No Record Cost Support to Establish a Lower Compensation Rate for ISP-bound Traffic

BellSouth's fallback position, presented for the first time in rebuttal testimony, is that the Commission could establish a lower compensation rate for ISP-bound calls. At the hearing, however, even BellSouth's witness questioned whether the Commission should adopt a lower rate without further investigation of many relevant issues. Rather, Ms. Cox encouraged the Commission

[28] Order No. PSC-98-1216-FOF-TP.

to "study this in the generic docket because there would, I'm sure, be updated information and even more characteristics that they would want to consider." (Tr. 494) As Ms. Cox admitted:

- BellSouth has not filed cost support for the lower rate (Tr. 493);
- the 1996 articles submitted by BellSouth were preliminary (Tr. 500);
- the 1996 articles were not designed to estimate Internet call duration (Tr. 498);
- the 20 minute duration example is only one source the Commission should consider (Tr. 499);
- the proposed reduction affects only the end office and not the tandem switching and transport reciprocal compensation elements (Tr. 495-6), which BellSouth is more likely to charge ALECs; and
- Ms. Cox did not know how the average call duration was established in initially setting reciprocal compensation rates (Tr. 497).

From the corporate telecommuter dial-in number and the mail order catalog service to the car dealership and the pizza parlor, there are any number of entities that may receive more inbound calls than the average business customer. Similarly, Mother's Day calls, radio station call-ins, and calls between teenagers may all have holding times as long as ISP calls. (Tr. 352) Presumably, calls to such high volume customers and longer duration calls were included when BellSouth developed its initial reciprocal compensation rates based on a 2.708 minute average call. (Tr. 497) However, neither Level 3 nor the Commission had the opportunity to examine the basis of either the 2.708 average call duration or the 20 minute average ISP call duration BellSouth used to develop the lower end office rate. BellSouth's results-oriented analysis is aimed at one key purpose – eliminating the ISP-bound traffic payments that have not gone its way over the past few years. The Commission should reject BellSouth's belated invitation to set a lower rate for ISP-bound traffic.

F. Issue 7A Should BellSouth be permitted to define its obligations to pay reciprocal compensation to Level 3 based on the physical location of Level 3's customers?

Level 3: ******No. Consistent with BellSouth's foreign exchange service, calls should be rated as local for intercarrier compensation purposes by comparing the* *originating and terminating NXXs. The calls are routed the same regardless of customer location and neither the Commission nor Level 3 has evaluated the feasibility of tracking and distinguishing such calls.******

Issue 7B: **Is BellSouth entitled to charge originating access on all calls to a particular Level 3 NPA/NXX when one or more numbers out of that NPA/NXX are assigned outside the boundaries of the BellSouth rate center or local calling area to which they are traditionally assigned?**

Level 3: ******No. Consistent with BellSouth's foreign exchange service, calls should be rated as local, not access, when the originating and terminating NXXs are in the same local calling area. BellSouth has admitted that its costs of delivering locally-dialed traffic do not differ based on a customer's physical location.******

1. BellSouth's Proposal Departs from Long-Standing BellSouth and Industry Practice of Treating FX-type Calls As Local

a. <u>BellSouth's Contract Language Serves Two Purposes: Circumventing Its Reciprocal Compensation Obligations and Forcing ALECs to Pay for Functions BellSouth Does Not Perform</u>

This issue concerns the payment of reciprocal compensation for traffic that is delivered to a customer who has subscribed to a local telephone number in a calling area where it has no physical presence. Both parties offer customers this ability to obtain a local telephone number in a "distant" local calling area. BellSouth offers several services that meet this need, including foreign exchange ("FX") service, and Level 3's service has been referred to as virtual NXX ("VNXX") service.

BellSouth does not deny that Level 3 is permitted to develop a product to respond to customer demand. (Tr. 501) Level 3 does not deny that carriers must pay access charges for a call that is classified as toll by comparing the numbers of the calling and called customers. (Tr. 280-1, 338-9) Rather, this dispute is about the intercarrier compensation mechanism that should apply for traffic that is *dialed as local by the calling party*, and routed to VNXX customers.

Customers (especially business customers) like VNXX services (and FX services offered by BellSouth) because such services permit them to obtain a telephone number in a local calling area where they do not have facilities. As far as the person calling that number is concerned, it is a "local" call, even though the party answering the call is located in another community. When one of BellSouth's customers makes a call to a Level 3 VNXX number, BellSouth's switching software recognizes the call as a call to one of Level 3's customers and BellSouth routes the call to the IP. BellSouth's switching software also recognizes the call as a local call, and bills its end user accordingly. BellSouth seeks to treat that call as a toll call for intercarrier compensation purposes. Level 3 seeks to treat it as a local call. Level 3's proposal, among other things, is in the public interest as it will benefit those businesses who find it desirable to obtain local numbers in several communities while maintaining a limited number of physical locations. It also benefits customers located in rural and sparsely populated areas of the state by allowing them to reach a wider range of businesses and services without incurring toll charges.

BellSouth's proposals, on the other hand, will raise the costs incurred by businesses to make their services available to rural residents of Florida, and it is therefore contrary to the public interest. First, in Section 5.1.8 of Attachment 3, BellSouth proposes that Level 3 cannot receive reciprocal compensation where its customer is physically located outside the local calling area of the calling party. Second, in Section 5.1.9 of Attachment 3, BellSouth proposes that Level 3 must pay BellSouth originating access charges for services ostensibly provided by BellSouth in getting calls to VNXX customers.[29] Level 3 would not receive reciprocal compensation for these calls and would be required to *pay* BellSouth for originating such calls.

As explained further below, the Commission should adopt Level 3's proposal to compensate Level 3 for the services it provides to BellSouth's customers and prevent overcompensation to BellSouth. BellSouth's proposals should be rejected because they are not based on cost, which is the guiding principle for determining reciprocal compensation under Section 252(d)(2) of the Act. Level 3's proposal is consistent with the historical industry practice of rating calls by comparing the NXX codes of the calling and the called parties. Level 3's proposal is also cost-based, as required by Section 252(d) of the Act, and would avoid serious adverse consequences, such as inefficient deployment of facilities, increases in costs to business customers – and their own patrons in sparsely populated areas – and absurd results from altering the historical practice of rating calls by NXX codes. Level 3's proposal encourages the development of competition by supporting innovative services that, among other things, provide local access to ISPs in otherwise underserved areas.

b. By Industry Practice and BellSouth's Conduct, Whether a Call Is Local or Toll Is Determined by Comparing the NXX Codes of the Calling and Called Parties

BellSouth's proposal would disrupt decades of industry call-rating practice and should therefore be rejected. Under standard industry procedure, carriers use NXX codes as rate center identifiers. (Tr. 212) This means that the software in the ILEC and ALEC switches and billing systems looks at the NXXs of the calling and called parties to determine whether a call is to be rated as local or toll. (Tr. 288, 377) BellSouth admits that it determines whether a call is local or toll by

---

[29] If, contrary to Level 3's recommendation, the Commission adopts BellSouth's position, it must at the very least make clear that BellSouth's proposals also apply to BellSouth's FX-type traffic. (Tr. 518)

comparing the NXXs of the calling and called parties; consistent with that practice, BellSouth is currently treating calls to its FX customers as local calls subject to reciprocal compensation. (Tr. 501-2)

By classifying a call as local or toll for intercarrier compensation based on the physical locations of the calling and called parties, BellSouth's proposal would create an unjustified exception to its own and the industry's long-standing call-rating practice. If adopted, the proposal would compel BellSouth and Level 3 to create new, and most likely expensive, billing arrangements for calls to VNXX and FX numbers. (Tr. 503) Calls that the switch and billing software today recognizes as local would no longer be treated as local. BellSouth's late-filed exhibit shows that even BellSouth, who began complaining about VNXX in Florida on December 7, 1999 when it filed its arbitration petition against Intermedia, will not be able to implement an *interim* billing arrangement until February 1, 2001. Even then, the arrangement will not prevent billing of reciprocal compensation on calls to BellSouth's FX numbers. (Ex. 13) This interim solution requires BellSouth to manually compile and enter FX numbers into a database and BellSouth has not explained how that database will be used. (Ex. 13) Such a manual process creates a disincentive for Level 3 to expand its customer base: the larger the base, the more onerous the screening function BellSouth would have Level 3 perform. (Tr. 252) Because BellSouth did not explain its efforts to distinguish between "virtual" and "physical" NXX customers until after the hearing, neither Level 3 nor the Commission had the opportunity to evaluate whether it is feasible to implement such a distinction. In addition, the burden on Level 3 to transition to new mechanisms for rating FX-type calls may be even more onerous and discriminatory if it is not implemented on an industry-wide basis, which can only be accomplished through the Commission's generic proceeding.

Further, by eliminating the industry practice of using NXX codes to rate a call, BellSouth's proposal may lead to unusual and confusing results. Assume, for example, that the facilities of an ISP using Level 3's VNXX product are located in downtown Jacksonville. Under BellSouth's proposal, a call from one of the ISP's subscribers served by BellSouth in Jacksonville to the Jacksonville NXX of the ISP served by Level 3 would be rated as local and reciprocal compensation would be owed; but a call from a BellSouth subscriber in Lake City to the same ISP's Lake City NXX code would not be rated as local and reciprocal compensation would not be owed because the ISP has no facilities in Lake City. However, under BellSouth's proposal, a call from the same *Jacksonville* ISP subscriber to the *Lake City* NXX code of his ISP *should* be considered local because the call originates and physically terminates in Jacksonville -- even though the number dialed is associated with Lake City, the switches processing the call would recognize the call as a toll call, and the calling party would be billed toll charges. In that case, reciprocal compensation would be owed for a call that has the appearances of a toll call to the switches connecting the call.[30] (Tr. 254-5) The confusion, administrative expense and inconvenience, and potential for conflict that will result from BellSouth's proposal would be best avoided by maintaining the standard industry practice – which BellSouth employs – of comparing NXX codes to rate a call as local or toll for all purposes. The regulatory treatment of a particular call should be the same for retail end user billing and intercarrier compensation. (Tr. 248-9)

[30] Although this unusual situation could happen as the result of BellSouth's proposal, Level 3 is not seeking to avoid paying access charges for calls that would be classified as toll by comparing the numbers of the calling and called parties. (Tr. 280-1, 338-9)

c. <u>The *Intermedia* Decision Did Not Answer the Question Presented Here</u>

The Commission should not look to the *Intermedia*[31] decision as precedent. In that case, while permitting the parties to establish their own local calling areas, the Commission also required the parties to assign NXXs within the area with which they are traditionally associated.[32] That is not the issue in this case, however. BellSouth admits that Level 3 should be permitted to "assign numbers outside of the areas with which they are traditionally associated," just as BellSouth has done for countless years. (Tr. 501) Level 3 will limit use of a NXX code to the proper rate center associated with it, as determined by the numbering administrator's assignment of that NXX code to Level 3. The distinct question presented here is whether the rating of a call should continue to be based upon a comparison of NXX codes – as carriers have done for years – or whether BellSouth will be permitted to alter that tradition in order to avoid compensating Level 3.

BellSouth also refers to decisions from other jurisdictions in favor of its position. Of course, different state commissions are free to establish different standards relating to interconnection agreements and the deployment of network facilities. Indeed, if the Commission is inclined to consider decisions from other state commissions for guidance, it should consider the Michigan Commission's decisions. In Michigan, the Commission found that the use of a VNXX arrangement does not impact the ILEC's financial and/or operational responsibilities, and that under the VNXX framework, the costs to the ILEC do not differ, but are "the same as when the call is undisputedly

---

31 Order No. PSC-00-1519-FOF-TP.

32 *Id.* at 43.

local."[33] The Michigan Commission has reached the same conclusion in two separate arbitration proceedings.[34] Like this Commission, the Michigan Commission is considering issues related to the use of VNXX codes in a separate proceeding, but that does not mean that it will change the results from two separate arbitration proceedings.

d. The Policy Implications of FX-Type Traffic Should Be Considered in an Industry-Wide Proceeding Dedicated to the Issue

BellSouth asks the Commission to find that an entire class of traffic normally rated as local should be subject to BellSouth's originating access charges rather than reciprocal compensation. BellSouth's proposal flies in the face of numerous Commission decisions upholding payment of reciprocal compensation for ISP-bound traffic. It is also contrary to the Commission's stated intention to resolve intercarrier compensation issues in a generic proceeding, where the Commission has asked all interested parties to submit evidence on these questions. Specifically, in Docket No. 000075-TP, the Commission asks:

> 15. (a) Under what conditions, if any, should carriers be permitted to assign NPA/NXX codes to end users outside the rate center in which the NPA/NXX is homed?
>
> (b) Should the intercarrier compensation mechanism for calls to these NPA/NXXs be based upon the physical location of the customer, the rate center to which the NPA/NXX is homed, or some other criterion?[35]

---

33 *In the Matter of the Petition of Coast to Coast Telecommunications, Inc., for Arbitration of Interconnection, Rates, Terms, Conditions, and Related Arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan*, Case No. U-12382, Order Adopting Arbitrated Agreement, 9 (Mich. Pub. Sev. Comm'n Aug. 17, 2000) ("*Coast-to-Coast*").

34 *Id.; In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan*, Case No. U-12460 (Mich. Pub. Sev. Comm'n Sept. 27, 2000).

35 Order No. PSC-00-2350-FOF-TP at 11.

Since the generic proceeding is open, it makes more sense to address the issue of how reciprocal compensation relates to FX and VNXX traffic in that proceeding, rather than to try to resolve it here in a single arbitration case. Adopting BellSouth's position here would lead to unreasonable discrimination against Level 3 *vis-a-vis* its ALEC competitors. The Commission should not rule on an issue that will have far reaching competitive and economic effects on the telecommunications industry without the benefit of industry involvement or developing a record that examines the broader implications of such a decision. The Commission should deny BellSouth's attempt to prejudge the determination that will be made in Docket 000075-TP.

2. Level 3 Would Receive No Compensation Under BellSouth's Proposal

BellSouth's proposal does not provide for any alternative form of compensation for traffic delivered to Level 3 customers using a VNXX arrangement. (Tr. 507) Thus, BellSouth is getting a "free ride" – Level 3 would receive no compensation from BellSouth for transporting and terminating those calls initiated by BellSouth subscribers. This result is unfair to Level 3 because the network functions provided by Level 3 and BellSouth are identical whether the NXX is for the local calling area in which the customer has facilities or for a different local calling area. In short, BellSouth asks the Commission to create a new third category of traffic for which no intercarrier compensation is paid to Level 3, without any basis in the record to indicate that segregating this traffic is feasible or justifiable. Such a result is not desirable, reasonable, or consistent with federal or state law. Leaving carriers uncompensated for certain kinds of calls will only discourage them from providing such services to their customers. And, since these "VNXX" services are often provided to ISPs, the impact on the telecommunications and Internet access market of making

Florida ISPs undesirable, cost-causing customers must be considered in much greater detail before the Commission takes action that would fundamentally modify the economics of these markets.

3. BellSouth Should Not Be Permitted to Recover Toll Revenue Lost Due to Competition

a. BellSouth's Focus on Customer Location Is Inappropriate Because Its Cost to Deliver Traffic to the IP Are the Same for Calls Terminating at a Virtual or Physical NXX

BellSouth's focus on the location of the called party is meaningless for purposes of determining cost-based compensation, because the originating party only bears the responsibility of transporting a given call to the IP, not all the way to the called party. Level 3's customer location will not cause BellSouth's costs or functions to differ in the context of a call placed by a BellSouth customer. As Mr. Gates testified, and Ms. Cox agreed (Tr. 510, 512), there will be no difference in BellSouth's costs when one of its customers dials a Level 3 customer who happens to reside physically outside the local calling area as compared to any other Level 3 customer who might happen to reside physically within the same local calling area. (Tr. 217) This is because when a customer of BellSouth's originates a call, BellSouth's responsibility for the calls ends when it delivers the call to the IP. (Tr. 217) A toll call differs operationally and economically from a VNXX call because, as Ms. Cox admits, the toll call is routed through a BellSouth access tandem and uses Feature Group D or intraLATA toll trunks. (Tr. 513)

The IP does not depend on where the customer physically resides; rather, it is a fixed point to which BellSouth and Level 3 have to take calls irrespective of customer location or local number dialed. (Tr. 222-3, 511-12) Since BellSouth always has to deliver a call originating from a particular area to the same point, it should be economically indifferent as to whether the call terminates to a physical or virtual NXX. If the customer is physically located in a distant calling area, Level 3 -- not BellSouth -- bears the cost of delivering the call to the customer, and Level 3 is not trying to recover any additional costs from BellSouth because of the customer's virtual presence. Level 3 is only trying to receive compensation for the terminating switching and interoffice transport it provides to BellSouth's customer in terminating the call. (Tr. 372-4, 382-3) Thus, BellSouth's request for switched access compensation based upon customer location is inappropriate and should be denied.

b. BellSouth Should Not Be Made Whole for Losses Due to Competition

The real point of BellSouth's argument on this issue is not clearly stated, but is nonetheless evident. BellSouth simply wants to recover lost toll revenues, and if it cannot recover them from a customer then it will gladly recover them from Level 3 instead. As Ms. Cox explained, when BellSouth provides FX service, the FX subscriber pays BellSouth "for the transport of that call, and for, really, the loss of toll revenue, that's recovered through FX charges." (Tr. 507) If the BellSouth customer did not purchase FX service, callers in the "foreign" local calling area would incur toll charges to call it. In this arrangement BellSouth loses toll revenue but gains FX revenue instead.

In a competitive environment, however, the ALEC, not BellSouth, is providing the so-called "toll" component of the service; that is, delivering the call from the end office switch to the "distant" location of the terminating party. BellSouth wants to recover "the loss of toll revenue" when it is only providing a local service; that is, originating the call and delivering it to the IP just like any other local call.

Service to a Level 3 customer that has established a "virtual" presence in a local calling area is, from a BellSouth network standpoint, indistinguishable from service to a Level 3 customer that has established a "physical" presence in a local calling area. BellSouth 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.

BellSouth's desire to recover its "loss of toll revenues" is understandable in terms of its desire to make money, but that is not a basis for setting reasonable interconnection terms in compliance with the Act. BellSouth can seek to recover lost revenues when *its customer* buys a service that eliminates toll charges, but it makes no sense for BellSouth to recover its lost revenue from Level 3, where Level 3 is incurring the cost to transport the calls to the terminating location. In a competitive market, when a company loses a customer, it also loses revenue. Since BellSouth isn't used to having competition, it may have trouble understanding this concept, but the Commission should not be fooled by its rhetoric. BellSouth is simply trying to get paid for not providing a service, and the Commission should reject this attempt at corporate welfare.

4. BellSouth's Proposal Raises Important Economic and Policy Concerns that the Commission Should Address in Its Generic Proceeding

a. <u>BellSouth's Proposal May Encourage Inefficient Network Deployment or Adversely Affect How Services are Provided to ISPs in Florida</u>

BellSouth never acknowledges or addresses the fact that VNXX is a more efficient form of providing telecommunications service to ISPs. By making VNXX traffic ineligible for reciprocal compensation, BellSouth may encourage inefficient network deployment or drive ALECs away from serving ISPs altogether.

Under a VNXX arrangement, the terminating carrier routes the call to the centrally located modem pool serving that ISP. There are a number of reasons why a single modem pool may be used by the ISP. For example, a single central location is easier for both the A EC and the ISP to maintain and reduces the requirement to locate, prepare and maintain numerous remote locations. (Tr. 229-30) By implementing this more efficient operation, under BellSouth's proposal, Level 3 would not be compensated for the termination function it provides for BellSouth. At the same time, however, if Level 3 established a modem pool for the ISP in that local calling area, and transported the call from its IP with BellSouth back to the local calling area of the ISP subscriber initiating the call,[36] Level 3 would be entitled to reciprocal compensation for that call. By being less efficient, Level 3 would receive compensation from BellSouth. In other words, rather than risk receiving no compensation for terminating VNXX traffic, an ALEC may deploy facilities to a local calling area to convert a virtual presence into a physical presence. Such facilities would be deployed solely to satisfy a physical presence requirement and would serve no useful network function. (Tr. 229-30) This arrangement would only make economic sense if the cost of deploying transport and establishing remote modem pools is less than the cost of Level 3 switching that would otherwise go uncompensated and access charges that would be paid to BellSouth. Alternatively, if the cost of deploying facilities in order to establish physical presences was prohibitive, carriers would be

[36] This alternative would require the ISP to establish a modem pool or other presence in each local calling area. The implications of such an investment in infrastructure on the costs of Internet access in Florida have not been considered by BellSouth. (Tr. 509)

deterred from taking the steps needed to serve ISPs, and the ISPs would in turn be able to serve fewer locations where end users could reach them by making a local call.

Whether the ALEC uses a VNXX arrangement, or deploys facilities that would serve no practical function solely to establish a physical presence, the functions provided by the terminating carrier that are compensated by the originating carrier– terminating switching and transport from the IP with BellSouth to the switch – are the same. Level 3's switch is in the same place whether or not the call is transported back to the remote local calling area, and the switching function it provides is also the same. All of the network functions involved in exchanging this traffic between the parties support a finding that these calls are local traffic. Thus, there is no need to take the unprecedented step of changing the manner in which carriers compensate one another for such calls. Rather than introduce inefficiencies and artificial disincentives into this traffic exchange process in the manner described above, the Commission should find that reciprocal compensation will continue to be paid for all local calls, whether a physical or virtual NXX is involved.

b. The Denial of Reciprocal Compensation for FX-Type Traffic Is Contrary to Public Policy Because It Will Increase the Likelihood that ISP Subscribers Will Be Unable to Reach ISPs by Dialing Local Telephone Numbers

As mentioned above, if carriers are not compensated for the terminating switching function they provide to BellSouth's subscribers through VNXX arrangements, some carriers may steer clear of providing services to ISPs and be forced to discontinue VNXX service altogether. As a result, ISP subscribers in Florida that connect to ISPs that subscribe to VNXX service may no longer be able to make a local call to reach those ISPs. These consequences are contrary to public policy: either BellSouth will be able to monopolize the market for VNXX service to ISPs through its products, or ISP subscribers will have to make toll calls to reach ISPs served by other carriers. The Commission should avoid this anticompetitive result by ruling that calls to ISPs using VNXX arrangements are eligible for reciprocal compensation.

III. Conclusion

Level 3's positions in this arbitration are supported by federal and state law, Commission and FCC rules, historical industry practice, and sound economic and public policy reasons. The Commission should adopt Level 3's positions to further the goals of opening Florida's local exchange markets to competition.

Respectfully submitted,

Kenneth A. Hoffman, Esq.
John R. Ellis, Esq.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302
(850) 681-6788 (Tel.)
(850) 681-6515 (Fax)

Russell M. Blau, Esq.
Tamar E. Finn, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 945-6917 (Tel.)
(202) 424-7645 (Fax)

Michael R. Romano
Level 3 Communications, LLC
1025 Eldorado Blvd
Broomfield, CO 80021
(720) 888-7015 (Tel.)
(720) 888-5134 (Fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following this 10th day of January, 2001:

Douglas Lackey, Esq.
Patrick Turner, Esq.
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

Douglas Lackey, Esq.
Patrick Turner, Esq.
BellSouth Telecommunications, Inc.
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375

Felicia R. Banks, Esq.
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Kenneth A. Hoffman, Esq.