BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Level 3 Communications, LLC for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc.	DOCKET NO. 000907-TP ORDER NO. PSC-01-1332-FOF-TP ISSUED: June 18, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

FINAL ORDER ON PETITION FOR ARBITRATION

BY THE COMMISSION:

Pursuant to Section 252 of the Telecommunications Act, Level 3 Communications, LLC (Level 3) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on July 21, 2000. On August 14, 2000, BellSouth filed its Response to Level 3's petition for arbitration. By Order No. PSC-00-1646-PCO-TP, Order on Procedure, issued September 15, 2000, the procedures were established and the controlling dates set for resolving the eight issues identified in the petition and response. Subsequently, Issues 4, 5, and 8 were resolved by the parties, and on December 6, 2000, an administrative hearing was held for the remaining issues. On December 18, 2000, Level 3, with the concurrence of BellSouth, filed a joint motion requesting that the filing date for briefs be extended until January 10, 2001. By Order No. PSC-00-2469-PCO-TP, issued December 21, 2000, Level 3's motion requesting additional time to file briefs was granted. After the administrative hearing for this docket, both parties submitted a written stipulation, whereby they agreed to defer the resolution of Issues 6 and 7 to

the generic docket on reciprocal compensation, Docket No. 000075-TP. This Order addresses the remaining arbitrated issues.

I. JURISDICTION

Level 3 asserts that the Commission's jurisdiction to arbitrate the issues in this docket is pursuant to Section 252 of the Act and Section 364.01, Florida Statutes. BellSouth asserts that the Commission has jurisdiction over this matter pursuant 47 U.S. § 252. We concur with the parties' assertions on this Commission's jurisdiction. Pursuant to Section 364.01, Florida Statutes, we have authority to exercise our independent state law authority so long as those requirements are not inconsistent with those imposed by the Act. Further, we believe that we have jurisdiction pursuant to Section 252 of the Federal Telecommunications Act of 1996 (Act), which sets forth the procedures for negotiation, arbitration, and approval of agreements. Section 252(b)(4)(C) states that the State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Based on the foregoing, we conclude that this Commission has jurisdiction over this matter.

II. PARTIES DESIGNATION OF THE INTERCONNECTION POINTS (IPS) FOR THEIR NETWORKS

As submitted for arbitration in the petition and response, this issue focused on the question of which party has the right to designate interconnection points for the exchange of traffic. BellSouth witness Cox submitted prefiled direct testimony and prefiled rebuttal testimony in which this issue was commingled with testimony dealing with compensation issues arising from interconnection, contending that the matters are inseparable. We acknowledge a nexus between this issue and the compensation issue.

The parties do not dispute the right of a competitive local exchange company to designate the technically feasible point or points of interconnection on an incumbent's network to which the competitor will deliver its traffic. The parties concur that interconnection must occur in each LATA where Level 3 seeks to serve customers because of prohibitions against BellSouth

originating interLATA traffic. The parties disagree on whether the incumbent is entitled to compensation for delivering its originated traffic to a POI that is distant from the local calling area in which the traffic originated, and whether BellSouth is entitled to designate POIs on its network for handing off its traffic to Level 3.

Level 3 witness Rogers contends the decisions, orders and rules promulgated by the FCC since Congressional passage of the Act allow a competitive LEC to designate a single interconnection point within an incumbents' LATA. Witness Rogers cites ¶78 of the FCC's Texas 271 Order (Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, released June 30, 2000) as the most recent affirmation of his assertion:

> Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.

BellSouth witness Cox testifies that she agrees with witness Rogers' reading of the Texas 271 order, but notes, "Level 3, however, still has the financial responsibility for getting to the local network where it wishes to serve customers. BellSouth is not obligated to deliver, at no charge, BellSouth's originating traffic to Level 3's POI outside the local calling area where the calls originate."

Referring to the our prior actions, Level 3 witness Rogers testifies, "consistent with the FCC's approach, and recognizing that many LATAs in BellSouth's network are served by more than one access tandem, this Commission has, where requested by an ALEC (Sprint), found that it is technically feasible to require a single IP within a LATA." Witness Rogers testifies that in Docket No. 961150-TP (Petition by Sprint Communications Company Limited Partnership d/b/a/ Sprint for arbitration with BellSouth Telecommunications, Inc. Concerning interconnection rates, terms, and conditions pursuant to the Federal Telecommunications Act of

1996) this Commission issued Order No. PSC-97-0122-FOF-TP which, on page 13, reads in part, "therefore, BellSouth shall interconnect with Sprint at any technically feasible point within BellSouth's network serving territory, including mid-span meets."

Witness Rogers cites a separate order of this Commission in an effort to support his position that the IP selected by a competitor is the point to which an incumbent must deliver its originated traffic. Witness Rogers testifies that in Docket No. 991854-TP, Petition of BellSouth Telecommunications, Inc. For section 252(b) arbitration of interconnection agreement with Intermedia Communications, Inc., in Order No. PSC-00-1519-FOF-TP on page 48, this Commission found, "At the POI, traffic is mutually exchanged between carriers." Witness Rogers contends this statement by us confirms that the interconnection point designated by a competitor is the point to which both parties are obligated to deliver their traffic.

BellSouth witness Cox does not contest the right of competitive LECs to designate points on an incumbent's network to which competitors will deliver their traffic, but witness Cox believes there is no federal law, rule or decision that compels BellSouth to bring its originated traffic to an IP designated by a competitor. Witness Cox testifies that support for her position can be found in the FCC's First Report & Order in CC Docket No. 96-98, dated August 1, 1996, Order No. 96-325, ¶209, which reads:

> We conclude that we should identify a minimum list of technically feasible points of interconnection that are critical to facilitating entry by competing local service providers. Section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points. Section 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select points in an incumbent LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors

> have an incentive to make economically efficient decisions about where to interconnect.

Witness Cox testified, "The ruling only specifies that the ALEC must establish a POI (point of interconnection) on the incumbent LEC's network for traffic originated by the ALEC. It does not obligate the incumbent LEC to specify a POI on the ALEC's network for traffic originated by the incumbent."

What BellSouth proposes, according to witness Cox, is to establish interconnection points in each local calling area within a LATA to deliver its originated traffic to Level 3. "The POI for BellSouth's originated traffic is a single point in a local calling area to which BellSouth will deliver all of its customer's traffic to the ALEC. The traffic originated by all BellSouth customers in a local calling area would be transported by BellSouth to a single point in that local calling area at no charge to the ALEC."

Under cross examination, however, an exchange between witness Cox and counsel for Level 3 led witness Cox to acknowledge that ¶209 of FCC Order 96-325 does not specifically give incumbents the right to designate multiple interconnection points on its own network.

Witness Cox uses the decision in TSR Wireless, LLC et al. V. US West Communications, Inc., et al, Memorandum Opinion and Order, FCC 00-194, June 21, 2000 to establish the basis for an analogy that she argues demonstrates that incumbents are not required to carry telecommunications traffic outside of local calling areas without compensation. Witness Cox contends that the basis for her premise is established in ¶31, which reads, "Section (47 C.F.R.) 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA (major trading area) in which the call originated, with the exception of RBOCs, which are generally prohibited from delivering traffic across LATA boundaries."

Witness Cox acknowledges FCC Rule 51.701(b)(2) applies to the relationship between a LEC and a CMRS provider. She points out, however, that at 47 C.F.R. §51.701(b)(1), the FCC defines local telecommunications traffic for purposes of reciprocal compensation as:

> Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission;

Witness Cox concludes, "Applying the result of the TSR order to this issue in this proceeding, BellSouth should not be required, without appropriate compensation, to deliver traffic to Level 3 at any point outside of BellSouth's 'local service area' established by the State Commission."

Level 3 witness Rogers acknowledges that local calling areas for wireline carriers are analogous to MTAs for wireless carriers. Furthermore, when asked about the definition of local traffic contained in 47 C.F.R. §52.701(1), he added that there is not anything in the FCC's definition of reciprocal compensation that states that local traffic must be handed off in the local calling area.

Level 3 witness Gates asserts the FCC prohibits incumbents from designating interconnection points on their network for the exchange of traffic with competitors. Witness Gates cites FCC 96-325 ¶220, which states, in part:

> 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 than other LECs (i.e., section 251(b) imposes different obligations on all LECs while section 251(c) obligations are imposed only on incumbent LECs).

Based on this, witness Gates testifies, "BellSouth may not assume some authority that is not provided in the Act. As such, BellSouth is wrong to suggest that each party may determine the IP for its own originating traffic."

BellSouth witness Cox contends that establishing a single IP in each LATA ignores the reality of BellSouth's legacy network architecture: "BellSouth has a local network in each of the local calling areas it serves in Florida. BellSouth may have as many as

10, 20, or more such local networks in a given LATA." The single IP per LATA concept, witness Cox testified, "simply ignores that there is not one 'network,' but a host of networks that are, generally, all interconnected."

Witness Cox argues it is the difference between BellSouth's network architecture and the architecture of competitive local exchange companies that sets the stage for this dispute over which entity chooses the IP and how many IPs per LATA are designated. Witness Cox testified:

> The network architecture of the two companies is very important, and the difference between the two architectures has created this issue. BellSouth actually has a number of distinct networks. For example, BellSouth has local networks, intraLATA toll networks, packet networks, signaling networks, E911 networks, etc. Each of these networks is designed to provide a particular service or group of services.

Witness Cox contends that if a customer subscribes to a specific service, the customer must be connected to the network where the service is provided. It follows, witness Cox asserts, "if an ALEC wants to deliver or receive a particular kind of traffic from a BellSouth customer, the ALEC must connect to the BellSouth network where that service is provided."

Level 3 witness Sachetti disputes witness Cox's assertion that BellSouth's architecture is a series of separate, distinct networks:

> Although monopolists such as BellSouth may have divided their network into local and access tandem serving areas, there is no technological reason to do so. Most new entrant carriers use a single switch for both local and long distance traffic. Furthermore, as BellSouth's own press releases acknowledge, the same local loops, central offices, and fiber transport networks used for local services are also essential inputs in the provision of other communications services -- including some of the most advanced services BellSouth is seeking to offer today. BellSouth clearly maintains the facilities

> necessary to connect its 'distinct local' networks and blurs the line between 'local' and 'other' facilities for its own end user customers. It is therefore disingenuous, and anti-competitive, for Ms. Cox to claim that Level 3 is not entitled to access the same integrated network BellSouth touts and provides to its end user customers.

In addition, Level 3 witness Rogers contends that the arguments over differing network architectures are rendered moot by the FCC. Witness Rogers cites portions of the FCC Order 96-325, ¶202 as the basis for his belief that incumbents may be compelled to modify their networks to accommodate interconnection. Specifically, the witness quotes the following passage from ¶202:

> use of the term 'feasible' implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment. This interpretation is consistent with the fact that incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of section 251(c)(2) and 251(c)(3) would be frustrated.

BellSouth witness Cox maintains that ignoring BellSouth's network architecture ignores the real issue that underlies the POI dispute which, she testified, is compensation. Witness Cox explains:

> BellSouth has a local network in each of the local calling areas it serves in Florida. BellSouth may have as many as 10, 20 or more such local networks in a given LATA. Nevertheless, Level 3 wants to interconnect its network with BellSouth's 'network' in each LATA at a single point. This approach simply ignores that there is not one 'network' but a host of networks that are, generally, all interconnected. Importantly, BellSouth

> does not object to Level 3 designating a single POI at a point in a LATA on one of BellSouth's 'networks,' and Level 3 only building its own facilities up to that point. Further, BellSouth does not object to Level 3 using the interconnection facilities between BellSouth's 'networks' to have calls delivered or collected throughout the LATA. What BellSouth does want, and this is really the issue, is for Level 3 to be financially responsible when it uses BellSouth's facilities in lieu of building its own facilities to deliver or collect these calls.

Level 3 witness Gates believes incumbents are compensated for delivering their originated traffic to a point designated by competitors, citing ¶34 of the FCC's TSR Wireless Order, which reads:

> According to Defendants, the *Local Competition Order's* regulatory regime, which requires carriers to pay for the facilities used to deliver their originating traffic to their co-carriers, represents a physical occupation of the Defendants (sic) property without just compensation, in violation of the Takings Clause of the Constitution. We disagree. The *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for terminating compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. 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.

Witness Gates contends this language means, "by this reasoning, Level 3 should not have to pay BellSouth for the interconnection trunks and facilities that transport BellSouth-originated traffic to Level 3 for termination."

BellSouth witness Cox believes local rates may not necessarily compensate BellSouth sufficiently for calls carried outside its local calling areas: "Although in theory, BellSouth is supposed to be compensated by the local exchange rates charged to BellSouth's local customers for hauling local calls within the same local calling area, there has always been a dispute over whether local exchange rates actually cover the cost of handling local calls."

Ultimately, BellSouth witness Cox asserted, Level 3 must bear the fiscal burden for its network design and interconnection decisions. However, BellSouth witness Cox acknowledged that the record of this proceeding does not contain cost data to support assertions that BellSouth would incur additional costs if single interconnection points are designated in LATAs.

Witnesses for Level 3 contend the Act, FCC decisions, FCC rules, and decisions of this Commission in previous arbitrations give it the sole discretion to determine one or more technically feasible POIs per LATA on BellSouth's network, at which POIs both parties will exchange traffic. BellSouth asserts, however, that it may, at its discretion, designate a POI in each calling area within a LATA and require Level 3 to collect BellSouth-originated traffic at these various IPs.

We find that the weight of the evidence presented supports the position advocated by Level 3 witnesses Rogers, Gates and Sachetti: A competitive LEC has the authority to designate the point or points of interconnection on an incumbent's network for the mutual exchange of traffic. We find nothing in the record of this proceeding that gives BellSouth the option of designating its own POIs, either in a LATA or in local calling areas within a LATA.

The FCC's First Interconnection Order states at ¶172, "The interconnection obligation of section 251(c)(2), discussed in this

section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' cost of, among other things, transport and termination of traffic." Subsequently, in the same order at ¶176, the FCC found, "we conclude the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic (emphasis added)." We find that the language used by the FCC is clear and unambiguous, referring specifically to the inherently reciprocal nature of an "exchange" of traffic at ¶172 and a "mutual exchange of traffic" at ¶176.

Witnesses for Level 3 emphasize that ¶78 of the Texas 271 Order, reads, "Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA." They also cite ¶199 of FCC Order 96-325 in an effort to demonstrate that technical feasibility is the only condition on which the right to designate a POI is contingent. That paragraph reads, in part, "we find the 1996 Act bars consideration of costs in determining 'technically feasible' points of interconnection or access. In the 1996 Act, Congress distinguished 'technical' considerations from economic concerns." Level 3 witness Paul testified Level 3 currently has single POI arrangements with BellSouth in the Southeast LATA and the Orlando LATA, which Level 3 argues in its brief is proof of technical feasibility under FCC Rule 51.305(e).

Level 3 witness Rogers also cites previous decisions of this Commission in arbitrations involving Sprint Order No. PSC-97-0122-FOF-TP and Intermedia, PSC-00-1519-FOF-TP to establish that technical feasibility is the sole determinant for establishing IPs in a LATA, and that IPs are for the mutual exchange of traffic. We do not dispute witness Rogers' interpretation of our prior orders, and note that the decisions provide supporting evidence but are not, in and of themselves, dispositive.

BellSouth witness Cox argues that the incumbent is entitled to designate a POI in each local calling area in a LATA for its originating traffic. The basis for this assertion, witness Cox testified, is FCC 96-325, ¶209, which she contends gives Level 3

the right to designate a POI for its originated traffic but does not bind BellSouth to that same POI for delivery of the incumbent's originated traffic. Witness Cox acknowledged, however, her interpretation requires an assumption of authority by an incumbent not specifically granted by the FCC.

Witness Cox further argues that multiple POIs are essential given BellSouth's legacy network architecture, which she testified may include up to 20 local calling areas in a single LATA. Witness Cox testified that without multiple POIs per LATA, BellSouth will shoulder the financial burden of transporting calls from distant local calling areas to interconnection points designated by Level 3.

Witness Cox acknowledges, however, that the record of this proceeding does not include cost data to support her underlying assertion that BellSouth will incur higher costs if Level 3 is permitted to designate single POIs per LATA. We note that pursuant to section 252(d) of the Act, for this Commission to establish a just and reasonable rate for interconnection of facilities, it behooves the party attempting to establish the rate to present evidence based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection. Absent this data, witness Cox's testimony can not be objectively evaluated.

Witness Cox contends that the TSR Order, FCC Order 00-194, read in conjunction with 47 C.F.R. §51.701(b)(2), mandates compensation whenever a wireline call is carried to a wireline interconnection point from a distant local calling area. Witness Cox's argument depends, however, on an inference that is not evident in the record. There is no indication in FCC Order 00-194 that the FCC has committed itself to a definition of local calling areas for the purpose of compensating incumbents for bringing their originated traffic to an interconnection point within a LATA, as suggested by witness Cox.

DECISION

Based on the record evidence, we find the FCC's orders, rules, and decisions vest in competitive local exchange companies the right to designate interconnection points for the mutual exchange

of telecommunications traffic. Further , we find nothing in the record granting BellSouth the authority to designate separate interconnection points for its originating traffic.

III. LEVEL 3'S ENTITLEMENT TO SYMMETRICAL COMPENSATION FOR LEASED FACILITY INTERCONNECTION

The issue before us is to determine under what circumstances Level 3 is entitled to receive symmetrical compensation for leased facility interconnection. The dispute involves intercarrier compensation for two components of leased facility interconnection: Leased Channel Facility (LCF) and Dedicated Interoffice Transport (DIT).

Level 3 witness Gates describes LCF as a flat-rated, non-mileage sensitive transport facility between the requesting carrier's Interconnection Point (IP) and the serving wire center on the other carrier's network. He describes DIT as a mileage sensitive transport facility between the serving wire center and the first point of switching on the other carrier's network. Witness Gates contends that the dispute is caused, in significant part, because of the differences in the two parties' networks. He explains that as a new entrant, Level 3 utilizes state-of-the-art digital technology, typically installing a single switch in a single building to serve an entire LATA. This single switch would be considered BellSouth's serving wire center. He states that BellSouth, however, has multiple central offices or wire centers per LATA, with the central office closest to Level 3's switch normally being designated as Level 3's serving wire center. Witness Gates states that for Level 3 traffic being terminated on BellSouth's network, Level 3 would purchase DIT between the Level 3 serving wire center and BellSouth's first point of switching. On the other hand, if BellSouth traffic is terminated on Level 3's network, which utilizes only one switch or central office, witness Gates contends that BellSouth would purchase DIT between the serving wire center (the Level 3 central office) and Level 3's first point of switching (the same Level 3 central office). Witness Gates argues that according to BellSouth's definitions and proposed language, BellSouth would not purchase DIT from Level 3, or it would purchase it at dramatically less than what Level 3 would have to pay.

Witness Gates also contends that BellSouth has structured its rates in such a way that BellSouth can charge more for the very same transport facility based only upon its location in a multi-switch network. He states:

> Based on the language proposed by BellSouth, when BellSouth originates traffic, it pays no dedicated interoffice transport. But when Level 3 originates traffic, it must pay for the dedicated interoffice transport, and that's patently unfair.
>
> New entrants, like Level 3, should not be disadvantaged by their choice of technology or by their network design. Level 3 should be allowed to charge BellSouth whatever it is that BellSouth charges Level 3 in order to have symmetrical rates. In other words, 10 miles of transport purchased by Level 3 should cost the same as 10 miles of transport purchased by BellSouth.

Witness Gates asserts that the asymmetry in compensation arises from BellSouth's proposed definition of serving wire center, which would preclude Level 3 from charging BellSouth for DIT. He states that Level 3 proposes to add language to ensure that Level 3 may charge BellSouth for facilities in an amount equal to that which BellSouth may charge Level 3 for traffic on the same route. This language states:

> Notwithstanding the foregoing definitions, to ensure that symmetrical compensation is achieved, Level 3 may charge BellSouth for Local Channel and Dedicated Interoffice Transport facilities in an amount equivalent to that which may be charged by BellSouth to Level 3 for traffic on the same route.

BellSouth witness Cox argues that although the network architectures of the parties are structured differently, the issue here is not whether or not Level 3 will be disadvantaged through a proposed definition of serving wire center. She contends that the problem is that Level 3 plainly seeks to charge for DIT when it is not performing the function that entitles it to such compensation. Witness Cox explains that DIT is charged for transport between two BellSouth wire centers or two Level 3 wire centers. She states

that BellSouth's proposed definition of serving wire center is consistent with the definitions in FCC Tariff No. 1, Florida state access tariffs, and Newton's Telecom Dictionary. Witness Cox states that BellSouth's proposed definition of serving wire center is "the wire center owned by one Party from which the other Party would normally obtain dial tone for its Point of Presence."

Witness Cox states that "BellSouth's position is that symmetrical compensation is appropriate where the services/functions provided are equal. However, in cases where different services or functions are being provided, compensation will not necessarily be symmetrical." She argues that compensation is only symmetrical for the rate elements provided within the local calling area. She explains that transport services typically consist of two sets of rate elements. The first set (LCF) is the flat-rated local channel which connects Level 3's IP to the BellSouth wire center that serves that location. The second set (DIT) is the distance-sensitive charges that apply for facilities that are provided between wire centers. She contends that Level 3 seeks to receive DIT rates when it is not performing this function. Witness Cox argues that since Level 3 has only one wire center in its network, it is not providing interoffice transport. She asserts, however, that BellSouth has two wire centers in its network and is entitled to charge for the interoffice transport when it provides this function.

Responding to Level 3 witness Gates' contention that BellSouth has proposed a complicated rate structure for DIT, BellSouth witness Cox argues that BellSouth has proposed the same rate structure that has been approved by this Commission and that is included in all of BellSouth's interconnection agreements. She states:

> BellSouth requests the Commission to affirm that BellSouth is complying with the structure that the Commission and its rules have created and that BellSouth's definition of Serving Wire Center is appropriate because it reflects the actual location of the Serving Wire Center. Moreover, BellSouth requests that the Commission find that Level 3 is not entitled to compensation for functions it does not perform.

We recognize that intercarrier compensation is a complicated issue in an environment where parties have constructed different network architectures to serve their customers. This issue arises from definitions and rate structures for transport elements that may not be equivalent between differing network architectures. BellSouth states that the parties have agreed to the definitions of LCF and DIT, the two transport elements involved in leased facility interconnection, as presented in the proposed interconnection agreement. While Level 3 witness Gates argues that to achieve equivalent compensation for new entrants the definitions should be fixed, he offers no alternative definitions in the record. Instead, witness Gates asserts that Level 3 should simply be entitled to charge BellSouth for LCF and DIT in an amount equivalent to that which BellSouth charges Level 3 for traffic on the same route. Witness Gates contends that in order to have symmetrical rates, 10 miles of transport purchased by Level 3 should cost the same as 10 miles of transport purchased by BellSouth.

On the surface, this argument appears compelling. It would seem logical that transport is transport, regardless of whose network is involved. In that case, symmetrical rates would seem appropriate. However, we believe a problem arises in applying symmetrical compensation for a generic transport function when different rates have been established for different elements of the transport function in question. In other words, the problem is not a matter of different transport facilities, but the application of rate structures designed for BellSouth's network architecture to the differing network architecture employed by Level 3. The parties have identified two elements of transport at issue, LCF and DIT, with different rates and rate structures being charged for each. DIT is defined as transport between two wire centers. We conclude that the evidence in the record shows that, since Level 3's network architecture utilizes only one switch or wire center, it does not provide the interoffice transport element (DIT). Therefore, we find that Level 3 is not entitled to charge for this service.

Level 3 witness Gates argues that "[I]f Level 3 is provisioning the transport or if BellSouth is provisioning the transport, both companies do the same functions, you know, tack up the same facilities, so there is no discrepancy there, but there is

a huge discrepancy in what the carriers are paid just based on the definitions and the language." He asserts that the transport facilities don't change and the rates should be symmetrical. As mentioned above, we recognize that this is a problem inherent in the process of establishing rates for transport elements between two companies with different network architectures. While Level 3 provides transport facilities to BellSouth, it does not provide the particular transport element defined as DIT. BellSouth witness Cox states that symmetrical compensation is appropriate where the services/functions provided are equal. We agree with this conclusion.

While Level 3 witness Gates states that this is not a reciprocal compensation issue, and that Level 3 does not base its claim for symmetrical compensation upon 47 C.F.R. §51.711, we note that this is the only rule that directly addresses symmetrical compensation. This rule states in part:

> §51.711 Symmetrical reciprocal compensation.
>
> (a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.
>
> (1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

Rule 51.711 states that the symmetrical rates are to be applied for the provision of the same services. Under the present definitions of the transport elements involved, we believe this would preclude Level 3 from assessing charges for the DIT service. However, subpart (b) of Rule 51.711 states:

> (b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the

> incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in §§51.505 and 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceeds the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that a higher rate is justified.

Since intercarrier compensation is a cost-recovery mechanism, we note that if Level 3 is unable to recover its transport costs through the LCF charge, avenues exist for establishing asymmetrical transport rates, and perhaps rate structures, that would enable Level 3 to recover its costs.

DECISION

We find that Level 3 should be entitled to symmetrical compensation for each element of leased facility interconnection that Level 3 actually provides. The evidence in the record shows that Level 3 does not provide Dedicated Interoffice Transport. Therefore, we find that Level 3 IS not entitled to charge BellSouth for this element of leased facility interconnection.

IV. COMPENSATION FOR THE USE OF INTERCONNECTION TRUNKS ON THE OTHER CARRIER'S NETWORK AND APPLICABLE RATES

The issue before us is whether the parties should be required to pay each other compensation for the use of the other carrier's interconnection trunks, and, if so, what rates should be imposed. BellSouth witness Cox argues that compensation is not appropriate if the incumbent is required to deliver traffic to an interconnection point (IP) within the local calling area from which the traffic originates. If BellSouth is required to carry the traffic to an IP distant from the local calling area in which it originates, witness Cox contends compensation is appropriate. Level 3 witness Gates argues the FCC has determined incumbents are

responsible for delivering traffic to an IP without charge, regardless of location within a LATA.

BellSouth witness Cox maintains this issue and dispute regarding the parties' designation of the IPs for their networks are collateral financial disputes, both of which occasioned by Level 3's network decisions, which she testifies will have BellSouth assuming financial responsibility for the competitor's network choices. This will occur, witness Cox alleges, because of the nature of BellSouth's legacy architecture:

> BellSouth has a local network in each of the local calling areas in Florida. BellSouth may have as many as 10, 20, or more such local networks in a given LATA. Nevertheless, Level 3 wants to interconnect its network with BellSouth's "network" in each LATA at a single point. This approach simply ignores that there is not one "network" but a host of networks that are, generally, all interconnected. Importantly, BellSouth does not object to Level 3 designating a single POI at a point in a LATA on one of BellSouth's "networks," and Level 3 only building its own facilities up to that point. Further, BellSouth does not object to Level 3 using the interconnection facilities between BellSouth's "networks" to have calls delivered or collected throughout the LATA. What BellSouth does want, and this is really the issue, is for Level 3 to be financially responsible when it uses BellSouth's facilities in lieu of building its own facilities to deliver or collect these calls.

What Level 3 wants, witness Cox believes, is for BellSouth to collect its originated traffic from each local calling area in a LATA and deliver that traffic to a single, technically feasible, interconnection point within the LATA at no expense to the competitor. Level 3's insistence on a single POI per LATA raises the specter of a cost shift away from Level 3 to BellSouth's customers, witness Cox contends. The witness also believes that this cost shift would be prompted both because of the incumbent's legacy network architecture, and a dispute over whether existing local rates actually cover the cost of local service. On the cost issue, witness Cox testifies, "although in theory, BellSouth is supposed to be compensated by the local exchange rates charged to

BellSouth's local customers for hauling local calls within the same local calling area, there has always been a dispute over whether local exchange rates actually cover the costs of handling local calls." A requirement to carry traffic outside the local calling area as Level 3 suggests, witness Cox asserts, would only compound the dispute over the adequacy of compensation for carrying local traffic. In addition, when asked witness Cox about the adequacy of BellSouth's local exchange rates, acknowledged that BellSouth's local rates cover the cost of completing local calls within the local calling area but do not cover the cost of carrying a call outside the local calling area.

The FCC recognizes the potential for compensatory disparity, according to witness Cox, in FCC Order 96-325, ¶199, which she quotes, in part, as follows: "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit." (Emphasis by the witness.)

In reference to defining what constitutes a "technically feasible but expensive interconnection", witness Cox indicates that she can not provide any specific criteria for the determination of this definition.

In addition to ¶199 of FCC Order 96-325, witness Cox relies upon ¶209, which states:

> Section 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect.

However, when asked to provide evidence of costs incurred by providing interconnection, witness Cox indicates that there is nothing in the record to support evidence of these costs.

Nevertheless, she indicates that the USE cost docket, Docket No. 990649-TP, will provide cost information of transport facilities.

Furthermore, the Act itself, witness Cox contends, contemplates compensatory schemes for transporting calls from distant local calling areas to a single POI within a LATA. Witness Cox quotes Section 251(c)(2)(D) of the Act, which reads:

> (2) INTERCONNECTION. -- The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network --
> (D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and 252.

Alluding to Section 252(d)(1) of the Act, which addresses pricing for interconnection, and Section 252(d)(2) of the Act, which addresses pricing for charges for transport and termination of traffic, witness Cox explains, "It hardly seems logical that Congress and the FCC would separately and expressly address both interconnection and reciprocal compensation for transport and termination of traffic if they thought compensation for each function was not appropriate."

According to witness Cox, further support for BellSouth's position can be found in the decision by the Eighth Circuit Court of Appeals in Iowa Utils. Bd. V. Federal Communications Commission, No. 96-3321, 8th Cir., June 10, 1999, which specifies in part:

> The Act requires an ILEC to (1) permit requesting new entrants (competitors) in the ILEC's local market to interconnect with the ILEC's existing local network and, thereby, use that network to compete in providing local telephone service (interconnection). . . .

The opinion is significant, witness Cox believes, because, "When Level 3 interconnects with BellSouth's local network in Jacksonville, it is not interconnecting with BellSouth's network in Lake City. It is only interconnecting with the Jacksonville local network."

Witness Cox uses the TSR Order to establish the basis for an analogy that she argues demonstrates that incumbents are not required to carry telecommunications traffic outside of local calling areas without compensation. Witness Cox testifies that the basis for her premise is established in ¶31, which reads, "Section (47 C.F.R.) 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA (major trading area) in which the call originated, with the exception of RBOCs, which are generally prohibited from delivering traffic across LATA boundaries."

Witness Cox acknowledges FCC Rule 51.701(b)(2) applies to the relationship between a LEC and a CMRS provider. She points out, however, that at 47 C.F.R. §51.701(b)(1), the FCC defines "local telecommunications traffic" for purposes of reciprocal compensation as:

> Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission;

Witness Cox concludes, "Applying the result of the TSR order to this issue in this proceeding, BellSouth should not be required, without appropriate compensation, to deliver traffic to Level 3 at any point outside of BellSouth's 'local service area' established by the State Commission."

Witness Cox distinguishes between the applicable charges if a POI is located within a local calling area or within a distant local calling area. Witness Cox also testifies that BellSouth would take financial responsibility for one-way trunks carrying a call from a BellSouth customer to a point of interconnection with Level 3 if the call originated from the local calling area within which the POI is located. When BellSouth is required to transport a call originating or terminating from a local calling area to a POI located in a distant local calling area, witness Cox argues that BellSouth believes it should receive compensation, consistent with the opinion in FCC Order 00-194.

Witness Cox further testified that the compensation arrangement she advocates would not lead to over recovery as alleged by Level 3 witness Gates. In addition, Cox states that "the cost of facilities and the trunks incurred in terminating and transporting calls. They are not specifically in the per minute reciprocal compensation rates. Those are end office switching rates and that type."

Level 3 witness Gates maintains it is, ". . .inappropriate to impose any charges for local interconnection trunks (and facilities upon which those trunks ride), as these are co-carrier facilities and trunks provided for the mutual benefit of the parties exchanging customer traffic, and both parties must deploy matching capacity on their side of the IP."

Witness Gates acknowledges 47 C.F.R. §51.703(b), which reads, "a LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network," has been the subject of debate, but testified that ¶25 in the FCC's order in the TSR Wireless case is clear. (The paragraph reads:

> Defendants argue that section 51.703(b) governs only the charges for "traffic" between carriers and does not prevent LECs from charging for the "facilities" used to transport their traffic. We find that argument unpersuasive given the clear mandate of the *Local Competition Order*. The *Metzger Letter* correctly stated that the Commission's rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself. Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic and would be inconsistent with the rules. Moreover, the Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates. Indeed, the distinction urged by Defendants is nonsensical, because LECs could continue to charge carriers for the delivery of originating traffic by merely redesignating the "traffic' charges as

> "facilities" charges. Such a result would be inconsistent with the language and intent of the Order and the Commission's rules.

Witness Gates interprets this paragraph to mean, "It is clear that each LEC bears the responsibility of operating and maintaining the facilities used to transport and deliver traffic on its side of the IP."

Witness Gates believes the FCC further clarified its reasoning in FCC Order 00-194 in ¶34, which reads:

> According to Defendants, the *Local Competition Order's* regulatory regime, which requires carriers to pay for facilities used to deliver their originating traffic to their co-carriers represents a physical occupation of the Defendants property without just compensation, in violation of the Takings Clause of the Constitution. We disagree. The *Local Competition Order* requires a carrier to pay the cost of the facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because the facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. 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.

Witness Gates testified, "By this reasoning, Level 3 should not have to pay BellSouth for the interconnection trunks and facilities that transport BellSouth-originated traffic to Level 3 for

termination." Witness Gates believes undisputed language in the proposed agreement at Attachment 3, Page 3, Section 1.1.1, Interconnection reflects the terms of FCC Order 00-194, the referenced portion of which reads, "each party is financially and operationally responsible for providing the network on its side of the IP."

In her testimony, BellSouth witness Cox appears to agree that each party should be responsible for its facilities on its side of the interconnection point. However, BellSouth witness Cox did testify that her agreement with section 1.1.1 is conditional:

> . . . [T]he reason that section is not in dispute is because the next section is. I mean, if you just read this -- that sentence by itself to the extent we're talking about calls, truly within the local calling area, the IP, we've agreed, it's within the local calling area, then this would be fine, but it's the fact that we can't agree on the IP that creates the problem.

DECISION

As previously stated, the evolving nature of FCC opinions, rules, and orders on locating points of interconnection, and the collateral effects of those opinions, rules and orders on compensation for transporting intraLATA traffic between incumbents and competitors, pose troubling questions. However, there does not appear to be sufficient record evidence to sustain a conclusion on the issue of whether the parties should be required to pay for the use of interconnection trunks on the other party's network. We find the evidence is insufficient to determine what rate, if any, should apply for use of interconnection trunks on the other party's network.

We conclude that BellSouth has failed to demonstrate a clear, argument that the parties should compensate each other for the use of interconnection trunks if those trunks are used to deliver traffic to a POI outside the local calling area from which the call originated. On the issue of what rates should apply, we find there is insufficient cost data in the record to support the application of a rate.

We concur with witness Cox's reading of the TSR Wireless Order insofar as the order requires an incumbent LEC to deliver its originated traffic to a wireless carrier within an MTA without charge to the wireless carrier. However, witness Cox does not address a number of questions that we consider to be germane to the issue. First, witness Cox does not address how 47 C.F.R. §51.703(b), which prohibits LECs from assessing charges for traffic that originate on the LEC's network, comports with her argument. Second, witness Cox does not reconcile her view with ¶25 of the TSR Wireless Order, which found, ". . .the Commission's rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself." Third, we conclude witness Cox fails to account satisfactorily for ¶34 of the TSR Wireless Order, in which the FCC stated, "the *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation." Thus, while potentially plausible, we find the witnesses arguments lacking in support.

Witness Cox argues BellSouth incurs greater costs when it is required to transport a call outside of the local calling from which it originated, and should be paid. Witness Cox maintains the adequacy of existing local exchange rates charged to BellSouth customers to cover the cost of handling local calls is in dispute and transporting calls outside a local calling area is not contemplated in local exchange rates. Witness Cox cites ¶209 of FCC Order 96-325, which provides that because competing carriers must, "usually compensate incumbent LECs for the additional costs incurred by providing interconnection," competitors are given an incentive to make economically efficient decisions about interconnection points. Witness Cox, nevertheless, acknowledges that there is no evidence in the record of this proceeding to support her testimony regarding the cost of carrying intraLATA calls, but noted that information is in this Commission's generic inquiry into unbundled network elements, Docket No. 990649-TP. That information is not in evidence in this proceeding, and, therefore, cannot be considered. Because of the lack of record evidence to substantiate the existence of greater costs incurred for intraLATA transport of telecommunications traffic, we cannot evaluate witness Cox's assertions. We would also note that the

issue of whether or not local exchange rates are sufficient to cover the cost of handling local calls was not identified as an issue in the petition for arbitration or the response to the petition, and is therefore not before this Commission.

Witness Cox also argues that Congress must have intended for compensation to be paid for transport and termination of traffic. As the witness admits, however, cost data is not part of the record of this proceeding; we do not find a basis for making a determination.

Level 3's witness Gates, on the other hand, observes that some confusion exists over the context of this dispute, owing to uncontested language in the agreement Section 1.1.1 of the proposed agreement that provides both parties will assume technical and financial responsibility for the facilities on their respective sides of the interconnection point. However, in view of witness Cox's testimony on this language, we are perplexed that language ostensibly accepted in the proposed agreement -- and that is potentially dispositive of this issue -- is apparently in dispute.

We further note the record of this proceeding is devoid of the type of cost data required in section 252(d)(1), which could substantiate witness Cox's claim that BellSouth will incur higher costs if Level 3 is permitted to designate a single IP per LATA. The absence of such data, particularly in light of testimony that Level 3 currently operates with single IPs in the Southeast LATA (Miami) and Orlando LATA, is a curious omission.

The FCC, in Order 96-325, specifically provides for compensation in instances in which competing carriers request "technically feasible but expensive" interconnection. In this proceeding, however, BellSouth witness Cox provides no criteria by which we can determine if Level 3's request could be considered "technically feasible but expensive." The same observation applies to the potential application of language at ¶209 of FCC Order 96-325, which reads, "competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection." Witness Cox, while citing this passage in her testimony, acknowledges there is no data in the record to support her argument that additional costs are incurred for transporting traffic between local calling areas.

While it may be possible ultimately for BellSouth to support its receiving of compensation for moving traffic from a local calling area to an IP in a distant local calling area and remain within the dictates of the FCC's opinions, rules, and orders, it has not met its burden in this proceeding. Therefore, we cannot reach a determination that the parties should compensate each other for the use of interconnection trunks on the other carrier's network.

V. CONCLUSION

We believe our decisions set forth herein comport with the requirements of Sections 251 and 252 of the Act. Accordingly, the parties shall submit a signed agreement that complies with our decisions in this Order for approval within 30 days of issuance of the this Order. This docket should remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the issues presented for arbitration in this proceeding are resolved as set forth in the body of this Order. It is further

ORDERED that the parties shall submit a signed agreement that complies with the decisions set forth in this Order for approval within 30 days of the issuance of this Order. It is further

ORDERED that this Docket shall remain open pending approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 18th day of June, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: _____
Kay Flynn, Chief
Bureau of Records

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).