

Level 3 Communications, LLC's Petition for	)	Exhibit No. _____
Arbitration Pursuant to Section 252(b) of the	)	Issue: NIM 4, 6; OET 5, 6, 7, 10-12; ITR
Communications Act of 1934, as amended by the	)	1-4, 10-14, 17, 18; ITR 5-9, 19; IC 1, 4,
Telecommunications Act of 1996, to establish an	)	6-9, 14, 17, 19, 20, and 21; CHC 1
Interconnection Agreement with the Southwestern	)	Witness: Richard Cabe, Ph.D.
Bell Telephone Company, L.P. d/b/a SBC Missouri	)	Type of Exhibit: Rebuttal Testimony
_____	)	Sponsoring Party: Level 3
	)	Communications
		Case No. TO-2005-0166
		Date: February 7, 2005

**BEFORE THE PUBLIC SERVICE COMMISSION**

**OF THE STATE OF MISSOURI**

**CASE NO. TO-2005-0166**

**REBUTTAL TESTIMONY**

**OF**

**RICHARD CABE, PH.D.**

**ON BEHALF OF LEVEL 3 COMMUNICATIONS, LLC**

**February 7, 2005**

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**INTRODUCTION**

**Q. PLEASE STATE YOUR NAME.**

A. My name is Richard Cabe and my business address is 221 I Street, Salida, Colorado.

**Q. ARE YOU THE SAME RICHARD CABE WHO FILED DIRECT TESTIMONY  
ON BEHALF OF LEVEL 3 IN THIS PROCEEDING?**

A. Yes, I am.

**PURPOSE OF TESTIMONY**

**Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

A. In this rebuttal testimony, I respond to the direct testimony of SBC witnesses Douglas, McPhee, Harris and Oyer. There are certain instances when SBC witnesses have made statements that are either inaccurate or factually incorrect. I will generally limit my rebuttal testimony to addressing those misstatements.

**REGARDING THE TESTIMONY OF SANDRA DOUGLAS**  
*Efficient Use of Interconnection Trunks*

**Q. HAVE YOU REVIEWED THE TESTIMONY OF SBC WITNESS SANDRA  
DOUGLAS REGARDING THE EFFICIENT USE OF INTERCONNECTION  
TRUNKS FOR ALL TRAFFIC?**

A. Yes. Ms. Douglas's testimony regarding this issue (and her advocacy for adopting SBC's language regarding these issues) focuses entirely upon the purported

1 technical inability of the carriers to identify different types of traffic and billing  
2 issues that result from that inability.<sup>1</sup>

3 **Q. HAVE YOU ADDRESSED MOST OF MS. DOUGLAS' ARGUMENTS IN**  
4 **YOUR DIRECT TESTIMONY?**

5 A. Yes. I addressed the vast majority of these issues in my Direct testimony at pages  
6 14 through 19. The effect of adopting SBC's position would be the inefficient  
7 operation of Level 3's network and the premature exhaust of SBC's tandems. As  
8 noted in my direct testimony (and in the direct testimony of Mr. Wilson) the billing  
9 issues Ms. Douglas discusses (and upon which her arguments rest) have been  
10 overcome by the industry.

11 **Q. CAN YOU COMMENT ON MS. DOUGLAS' ADVOCACY REGARDING THE**  
12 **USE OF TRUNKS TO CARRY DIFFERENT TYPES OF TRAFFIC?**

13 A. Yes. Ms. Douglas's proposed resolution to what she perceives as billing problems  
14 is to adopt language in this interconnection agreement that would require Level 3  
15 to build out a separate, duplicate network. Even if the billing issues described by  
16 Ms. Douglas existed, such a solution would be unreasonable at best and absurd at  
17 worst. SBC's proposed language reflects its incentives to force Level 3 to operate  
18 in a manner that is less efficient and would also exacerbate the exhaust of SBC  
19 tandems.

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<sup>1</sup> See Direct of Douglas at 7-12.

***Multijurisdictional Trunking***

**Q. AT PAGE 7 OF MS. DOUGLAS' TESTIMONY SHE CLAIMS THAT  
"...INTEREXCHANGE TRAFFIC NOT EXPLICITLY INCLUDED WITHIN  
THE PARTIES' INTERCONNECTION AGREEMENT IS SUBJECT TO  
SWITCHED ACCESS CHARGES..." DO YOU AGREE?**

A. No. Simply because a particular type of traffic is not addressed in the interconnection agreement does not mean that interstate access charges automatically apply. Such a statement is not supported by Part 69.5 of the FCC's Rules as suggested by Ms. Douglas. Instead, the traffic should be subject to the applicable tariff SBC has on file with the PUC or the FCC. SBC cannot unilaterally apply switched access charges – perhaps one of its most profitable offerings -- to Level 3 traffic.

**Q. AT PAGE 7 OF HER TESTIMONY, MS. DOUGLAS ASSERTS THAT "IT IS  
CLEAR TO ME THAT LEVEL 3'S PROPOSAL TO COMBINE ALL  
TRAFFIC ON A SINGLE GROUP OF TRUNKS WOULD CREATE THE  
RISK OF CONTINUAL, CHRONIC UNDERBILLING OF ACCESS  
CHARGES BY SBC MISSOURI ON INTEREXCHANGE TRAFFIC BEING  
DELIVERED BY LEVEL 3 TO SBC MISSOURI'S NETWORK." IS THIS  
CORRECT?**

A. Ms. Douglas is making assertions that dramatically overstate and misrepresent the facts. For instance, PIUs and PLUs have been used for years – indeed, decades -

1 and since they have been in place, SBC has always had the ability to audit the  
2 underlying support for those factors. In fact, the ability to audit PIU information  
3 has been in place since divestiture. Further, estimated factors are updated regularly  
4 to ensure that they reflect the most recent traffic patterns. At pages 8 and 9 of her  
5 testimony, Ms. Douglas refers to SBC's intrastate tariff regarding the development  
6 and application of the PIU. This is hardly a new or problematic process.

7 The question the Commission should ask is whether a more expensive  
8 network construct outweighs the traditional use of allocation factors. Since the  
9 allocation factors are updated over time, the potential for a significant problem –  
10 either under or overstatement of a particular jurisdiction – is very limited.

11 **Q. AT PAGE 10 OF MS. HARRIS' TESTIMONY SHE STATES, "LEVEL 3**  
12 **SHOULD NOT BE ALLOWED TO EVADE TARIFFED SWITCHED ACCESS**  
13 **CHARGES BY ROUTING SUCH INTEREXCHANGE TRAFFIC OVER**  
14 **LOCAL INTERCONNECTION TRUNK GROUPS, WHICH ARE NOT**  
15 **INTENDED FOR ACCESS TRAFFIC AND DO NOT PERMIT SBC TO BILL**  
16 **ACCESS CHARGES TO LEVEL 3." IS THIS A CORRECT STATEMENT?**

17 **A.** No. SBC can bill Level 3 for the various types of traffic that will flow over  
18 interconnection trunks. The allocation factors discussed herein will work perfectly  
19 well for this purpose. The factors are based on actual traffic data and are updated  
20 regularly. Further, SBC can always audit the factors if they have reason to believe  
21 they are incorrect.

1       **Q.    ARE THERE BILLING DISPUTES TODAY WITH FEATURE GROUP D**  
2       **AND OTHER SBC PRODUCTS AND SERVICES THAT USE AUTOMATED**  
3       **BILLING APPROACHES INSTEAD OF ALLOCATION FACTORS?**

4       A.    Yes. Ms. Douglas' proposal will not prevent billing disputes. Even products that  
5       are specifically identifiable and utilize mechanized (Automatic Message  
6       Accounting - AMA) billing systems still result in billing disputes. As such, even  
7       if SBC were successful in getting CLECs to use separate trunks for each type of  
8       traffic, there would still be disputes as to what traffic is sent to the trunks.

9       **Q.    ARE YOU SUGGESTING THAT EVEN THE CARRIER ACCESS BILLING**  
10       **SYSTEM ("CABS") THAT MS. DOUGLAS ADDRESSES AT PAGE 8 OF**  
11       **HER TESTIMONY IS NOT PERFECT?**

12       A.    Yes. CABS – which was developed for billing access charges – is not a perfect  
13       system, and does result in billing disputes. Ms. Douglas mentioned one such  
14       imperfection that requires the use of a PIU to allocate traffic when the calling party  
15       number is not sent with the call.

16               Rather than impose inefficiencies on CLECs and on the SBC tandems, the  
17       Commission should allow CLECs to continue to use allocators – such as PIUs and  
18       PLUs – to distinguish rates for traffic on multijurisdictional trunks.

19       ***Tandem Exhaust***

20       **Q.    PLEASE EXPLAIN HOW THE SBC PROPOSAL WILL EXACERBATE**  
21       **SBC'S TANDEM EXHAUST.**

1       A.     Tandems have a limited capacity. On average a tandem may have 100,000 trunks.  
2             If SBC forces Level 3 and other CLECs to use separate trunks for different types  
3             of traffic, then the demand for trunks will increase dramatically. Given the cost of  
4             tandems, one would think that SBC would try to minimize trunk usage by carriers,  
5             not increase the usage. In my direct testimony, I discuss the fact that SBC's  
6             proposals in this arbitration would not only disadvantage Level 3 by forcing Level  
7             3 to operate inefficiently, but that those proposals would also force SBC to incur  
8             unnecessary costs and to operate its network in less than optimal ways as well.  
9             Because SBC recovers its operating costs from its ratepayers (and its captive CLEC  
10            customers), SBC's proposals would put upward pressure on Missouri consumers'  
11            retail rates. SBC's willingness to over-tax tandems is just another example of  
12            SBC's willingness to impair its own network and incur additional costs to further  
13            disadvantage its competitors.

14            ***Internet Protocol Traffic***

15       **Q.     MS. DOUGLAS REFERS TO "INTERNET PROTOCOL TRAFFIC" AS "A**  
16            **FORM OF INTERLATA TRAFFIC". (DIRECT OF DOUGLAS AT 9) DO**  
17            **YOU AGREE WITH THAT CHARACTERIZATION?**



1 A. No. Ms. Douglas uses this flawed definition to justify the application of access  
2 charges. If the traffic is Internet protocol traffic, then the FCC's intercarrier  
3 compensation regime applies, and not access charges.<sup>2</sup>

4 **Q. IF THE INTERNET PROTOCOL TRAFFIC WERE "INTERLATA" AS**  
5 **SUGGESTED BY MS. DOUGLAS, WOULD THAT CHANGE THE**  
6 **INTERCARRIER COMPENSATION FOR THE TRAFFIC?**

7 A. No. The FCC did not distinguish "local" ISP-bound traffic from what SBC implies  
8 is "non-local" ISP-bound traffic. Whether the traffic is "local" or "non-local" is  
9 simply not relevant to application of the *ISP Remand Order* to ISP-bound traffic.<sup>3</sup>  
10 Ms. Douglas' suggestion that all Internet protocol traffic is interLATA and  
11 therefore subject to access charges is simply wrong.

12 Focusing upon the physical location of the ISP or its modem banks to  
13 determine intercarrier compensation would be contrary to the very reasoning by  
14 which the FCC found this traffic to be interstate in the first instance. By focusing  
15 on the physical location of ISPs in the context of locally dialed traffic, SBC is  
16 attempting to distinguish ISP-bound traffic that is directed to an ISP with FX-like  
17 service from that which is directed to an ISP physically located in the local area  
18 where the NXX code is homed. This is a distinction that the FCC refused to make,

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<sup>2</sup> Ms. Douglas uses the phrase Internet protocol traffic very loosely. She makes no attempt to distinguish between the different types of IP traffic or whether a protocol conversion takes place.

<sup>3</sup> *ISP Remand Order*, 16 FCC Rcd. at 9178-79. Mr. McPhee appears to make this same claim at page 10 of his testimony.

1 and neither should this Commission. The FCC was in fact fully aware that CLECs  
2 were using FX-like arrangements to serve ISPs months before the *ISP Remand*  
3 *Order* was released. Indeed, several carriers including SBC lobbied the FCC to  
4 account for FX-like/VNXX traffic in a separate manner.<sup>4</sup> The FCC was not  
5 persuaded, and the *ISP Remand Order* makes clear that the federal intercarrier  
6 compensation regime applies to *all* ISP-bound traffic even if it does not specifically  
7 address FX-like traffic:

8 We conclude that this definition of ‘information access’ was meant  
9 to include *all access traffic* that was routed by a LEC ‘to or from’  
10 providers of information services, of which ISPs are a subset.<sup>5</sup>  
11

12 **Q. HOW SHOULD ISP-BOUND TRAFFIC AND OTHER IP-ENABLED**  
13 **SERVICE CALLS BE TREATED?**

14 A. ISP-bound traffic, and other IP-enabled traffic, that meets the federal statutory test  
15 for information services should not be subject to access charges. As discussed  
16 above, the FCC did not distinguish “local” ISP-bound traffic from “non-local” ISP-  
17 bound traffic, mooting the issue of whether the *ISP Remand Order* applies only to

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<sup>4</sup> See ex parte filings in FCC CC Docket No. 99-68: Letter dated March 28, 2001 from Gary L. Phillips, SBC Telecommunications, Inc., to Dorothy Attwood, Chief, Common Carrier Bureau, Federal Communications Commission, at 3; Letter dated March 7, 2001 from Susanne Guyer, Verizon, to Dorothy Attwood, at 2-3; Letter dated December 13, 2000 from John T. Nakahata, Counsel to Level 3 Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1.

<sup>5</sup> *ISP Remand Order* at ¶ 44 (emphasis added).

1 “local” ISP-bound traffic. The enhanced service provider (“ESP”) exemption  
2 specifically exempts ESPs from interstate access charges.<sup>6</sup>

3 **Q. PLEASE EXPLAIN.**

4 A. ESPs – including ISPs – have the option to be treated as end users, rather than  
5 carriers, for purposes of the FCC’s interstate access charges. ISPs are allowed to  
6 purchase their services from local tariffs and are not subject to access charges.

7 **REGARDING THE TESTIMONY OF SCOTT MCPHEE**  
8 ***ISP-Bound Traffic***

9 **Q. MR. MCPHEE MAKES STATEMENTS REGARDING THE NATURE OF**  
10 **ISP-BOUND TRAFFIC. DO YOU AGREE WITH HIS POSITION?**

11 A. No. To be specific, Mr. McPhee states at page 4 of his direct testimony:

12 ISP-Bound Traffic originates from an end-user that is served by an  
13 Internet Service Provider (ISP) physically located within the same  
14 ILEC mandatory local calling scope.

15  
16 Mr. McPhee is trying to create a distinction that simply does not exist in current  
17 rules for inter-carrier compensation related to ISP-bound traffic. Adopting SBC’s  
18 proposed distinction between “local” and “non-local” ISP-bound traffic – which is  
19 not in the FCC’s current framework – would have dire consequences for Missouri  
20 consumers.

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<sup>6</sup> See *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC2d 682, 711 (1983); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2633 (1988); *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16133 (1997). Ms Harris is wrong to suggest at page 12 of her testimony that the exemption does not apply to IP to PSTN traffic. Such traffic is information service traffic and is subject to the ESP exemption.

1       **Q.     WHAT “DIRE CONSEQUENCES” DO YOU REFER TO?**

2       A.     Under SBC’s approach, Missouri consumers would have to pay toll charges (or a  
3             similar per minute charge) for dial-up internet access, except in the circumstance  
4             that their ISP happened to be physically located within their local calling area. The  
5             charge could arise in a variety of different ways, but a per minute charge – either  
6             an access charge or the usage sensitive component of FX charges Mr. McPhee  
7             describes at page 15 of his direct testimony – would be collected by SBC and  
8             ultimately paid by Missouri consumers. The alternative of ISPs physically locating  
9             in every local calling area is also possible, but would impose other costs on  
10            consumers, and would certainly not result in the present level of competition among  
11            ISPs, especially in rural areas.

12       **Q.     YOU SAID THAT THE DISTINCTION BETWEEN “LOCAL” AND “NON-**  
13           **LOCAL” ISP-BOUND TRAFFIC IS NOT A PART OF THE PRESENT**  
14           **REGULATORY FRAMEWORK. PLEASE EXPLAIN.**

15       A.     The relevant distinction is not related to the physical locations of the ISP and dial-  
16             up internet access customer, but rests on the fact that the ISP is an Enhanced  
17             Service Provider, and as such may use interstate access services, but is exempt from  
18             paying interstate access charges. As I mentioned above in response to Ms. Douglas,  
19             the FCC did not distinguish “local” ISP-bound traffic from what SBC implies is  
20             “non-local” ISP-bound traffic, mooted the issue of whether the *ISP Remand Order*

1 applies only to “local” ISP-bound traffic.<sup>7</sup> Mr. McPhee is wrong to suggest that the  
2 FCC’s *ISP Remand Order* targeted only a narrow category of ISP traffic.<sup>8</sup> All ISP-  
3 bound traffic falls within the scope of the FCC’s preemption ruling, including  
4 locally dialed traffic to ISPs using FX and FX-like arrangements.

5 The FCC has expressly noted in considering the jurisdictionally mixed nature of  
6 ISP-bound traffic that a focus on the location of the modem banks or customers to  
7 determine jurisdiction would be an odd result:

8 Consumers would be perplexed to learn regulators believe they are  
9 communicating with ISP modems, rather than the buddies on their e-mail  
10 lists.<sup>9</sup>

11 The FCC and the courts have determined on several occasions that ISP-bound  
12 traffic is jurisdictionally mixed.<sup>10</sup> Consequently, the physical location of an ISP simply  
13 does not matter in determining the intercarrier compensation mechanism that applies to  
14 an ISP-bound call. The FCC observed that:

16 [m]ost Internet-bound traffic traveling between a LEC’s subscriber  
17 and an ISP is indisputably interstate in nature when viewed on an  
18 end-to-end basis. . . The “communication” taking place is between  
19 the dial-up customer and the global computer network of web  
20 content, e-mail authors, game room participants, databases, or  
21 bulletin board contributors.<sup>11</sup>  
22

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<sup>7</sup> *ISP Remand Order*, 16 FCC Rcd. at 9178-79.

<sup>8</sup> See also McPhee Direct at 8-10.

<sup>9</sup> *ISP Remand Order* at ¶ 59.

<sup>10</sup> See, e.g., *Bell Atlantic*, 206 F.3d at 5 (noting that Internet-related traffic is “not quite local” and “not quite long distance”).

<sup>11</sup> *ISP Remand Order*, at ¶¶ 58, 59.

1 The physical location of the ISP or its modem banks is therefore irrelevant to what  
2 the CLEC and the ILEC should pay each other for exchanging traffic under the  
3 FCC's intercarrier compensation regime.

4 Indeed, it would be bizarre to conclude that traffic destined for an ISP  
5 physically located in the local calling area is *not* local and is in fact jurisdictionally  
6 interstate in nature (because it goes onto the Internet) and subject to the FCC  
7 determined rate structure for ISP Bound traffic, while concluding that traffic  
8 destined for an ISP located *farther away*, outside the local calling area, is intrastate  
9 in nature (regardless of the fact that the call also goes onto the Internet) and  
10 therefore is subject to the intrastate originating access charge structure.

11 **Q. AT PAGES 4 THROUGH 7 OF HIS TESTIMONY MR. MCPHEE PROVIDES**  
12 **"BACKGROUND" ON THE RATING OF CALLS. DO YOU AGREE WITH**  
13 **HIS POSITION?**

14 A. No. Mr. McPhee's attempt to link the FCC's separations procedures with the *ISP*  
15 *Remand Order* conclusions is flawed and unsupportable. Let me explain. Mr.  
16 McPhee correctly describes the manner in which distances and jurisdiction are  
17 determined at page five of his testimony. He is correct in his discussion of V&H  
18 coordinates, the use of the toll indicator digit (1+) and the state commission  
19 authority to establish local calling areas. In fact, he correctly notes that this  
20 traditional method of rating and routing calls is used to determine the appropriate  
21 intercarrier compensation. The fatal flaw in Mr. McPhee's testimony occurs when

1 he refers to the arcane and outdated separations processes. As the Commission is  
2 well aware, the FCC's separations procedures do not apply to the question of which  
3 tariff or method of inter-carrier compensation is appropriate, as suggested by Mr.  
4 McPhee, but instead are used to apportion revenues and costs to jurisdictions.

5 **Q. SHOULD THE COMMISSION RELY ON SEPARATIONS FOR ANY**  
6 **ASPECT OF INTERCARRIER COMPENSATION IN THIS PROCEEDING?**

7 A. No. Jurisdictional separations is the process by which incumbent local exchange  
8 carriers apportion regulated costs between the intrastate and interstate  
9 jurisdictions.<sup>12</sup> The intrastate costs that result from application of the Part 36 rules  
10 form the foundation for determining carrier's intrastate rate base, expenses and  
11 taxes.<sup>13</sup> The FCC's *Part 36 Freeze Order* recognized that its separations procedures  
12 were outdated. The FCC stated:

13 The current Part 36 separations regime, which has been largely  
14 unmodified for the past several decades, was developed when local  
15 telephone service was provided largely through circuit-switched networks  
16 operated by companies with monopoly power in the local market, with  
17 clear delineation between interstate and intrastate services. Since the  
18 enactment of the Telecommunications Act of 1996, however, and the  
19 growing presence of new, high-bandwidth technologies and services in  
20 the local market, including the Internet, the telecommunications  
21 landscape has changed significantly, and lines between interstate and  
22 intrastate services are becoming increasingly blurred. In addition, with  
23 the emergence of some competitive local exchange providers, we need  
24 to reexamine regulatory structures that apply only to incumbent local  
25 exchange carriers. We take the first step in this Report and Order

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<sup>12</sup> See FCC Report and Order, FCC 01-162; CC Docket No. 80-286; Released May 22, 2001; at ¶  
3. ("*Part 36 Freeze Order*")

<sup>13</sup> Id.

1           towards the eventual reform or elimination of one such regulatory  
2           structure.<sup>14</sup>

3           As such, the FCC recognizes that its separations procedures are completely inadequate  
4           to deal with the emergence of new technologies, including Internet technologies. To  
5           somehow extend this process to determining the jurisdiction treatment of ISP-bound  
6           traffic would contradict the FCC's clear pronouncements on the intercarrier  
7           compensation for ISP-bound traffic and be completely unworkable from an application  
8           or theoretical standpoint.

9           *Use of Numbering Resources*

10       **Q.   DOES MR. MCPHEE'S STATEMENT ON PAGE 16 THAT CLECS**  
11       **DEPLOY NPA-NXX CODES "IN A SWITCH MILES AWAY FROM**  
12       **THE GEOGRAPHIC LOCATION TO WHICH IT APPLIES"**  
13       **TROUBLE YOU?**

14       A.   Yes. First of all, numbers reside in the CLEC switches, not in geographic rate  
15       centers or switches where the calls originate. Any notion that the contrary is  
16       true is residual from the time when the incumbent monopoly was, with the  
17       exception perhaps of fledgling mobile service providers, the only consumer  
18       of numbering resources. Numbering resources, superficially speaking, are  
19       assigned per the Local Exchange Routing Guide ("LERG") to various rate  
20       centers but, in fact, the numbers assigned to a CLEC always reside in the  
21       CLEC switch, just as SBC's numbers reside in its switches. So absent a

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<sup>14</sup> Id. at ¶1



1 requirement that CLECs put a switch in every local calling area where it has  
2 customers, CLEC numbers will always be in their switches which, by design,  
3 almost assuredly are located outside the ILEC-defined rate centers in which  
4 the CLEC has customers.<sup>15</sup>

5 ***Transit Traffic***

6 **Q. HAVE YOU READ MR. MCPHEE'S TESTIMONY ON TRANSIT**  
7 **ISSUES?**

8 A. Yes, I have.

9 **Q. DO YOU HAVE ANY DISPUTE WITH HIS POSITIONS?**

10 A. Yes. Mr. McPhee suggests that transiting traffic from Level 3 through SBC to  
11 another CLEC is not required under Section 251(c)(2). He further suggests at  
12 pages 19 and 20 of his testimony that transiting service does not involve  
13 interconnection, and, as such, SBC is not required to provide the service.

14 While the Act does not define transit traffic and explicitly include it  
15 as part of the obligation of interconnection, the intent of the Act and sound  
16 public policy dictates that SBC, as the incumbent provider and the only  
17 provider with ubiquitous facilities in its serving territory, should be required  
18 to provide the transiting service as it has been doing. The ubiquity of the  
19 facilities that make SBC the natural provider of transit services is a vestige of  
20 its once-legally-protected monopoly status. Now that competition has been

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<sup>15</sup> Of course there are situations in which the CLEC switch is located within the local calling area where the numbers are assigned.

1 introduced, SBC continues to maintain the only ubiquitous presence in SBC's  
2 operating territory, in which competitive carriers must continue to rely on  
3 other carriers for the transmission and routing of much of their telephone  
4 exchange and exchange access traffic. Transiting efficiently serves that  
5 function and, as such, permitting interconnection with SBC to be used for  
6 transiting is an integral part of the incumbent's obligations under Section  
7 251(c)(2) of the Act. After all, the facilities are in place and SBC is  
8 compensated for the service provided. The only possible reason for SBC to  
9 refuse to handle this traffic is a desire to disadvantage its competitors that are  
10 not the direct beneficiaries of SBC's historical monopoly status.

11 **Q. WHY DO YOU SAY THAT SBC IS ATTEMPTING TO**  
12 **DISADVANTAGE ITS COMPETITORS?**

13 A. If SBC is allowed to withhold transiting service from CLECs, such carriers  
14 would be unable to complete calls from their local exchange customers to the  
15 customers of some small local exchange companies. In order to continue in  
16 business, such competitive carriers would be forced to construct facilities that  
17 essentially duplicate facilities SBC already has in place and which are entirely  
18 suited to transiting the traffic of other carriers. As noted above, SBC's unique  
19 position with respect to these facilities is directly related to SBC's former  
20 status as a regulated monopoly, and the opening of its local network to  
21 competitors should, as a policy matter, if not required legally, as I suggested

1 above, be available for transiting purposes. As an alternative, SBC suggests  
2 that Level 3 could enter into commercial negotiations for transiting services,<sup>16</sup>  
3 as though SBC's transiting services were simply one of several co-equal  
4 alternatives available to CLECs for interconnection with all other local  
5 networks in the same local area. Absent the dominant incumbent's transiting  
6 services, Level 3 could be required to establish, monitor and maintain  
7 interconnection arrangements with every other local carrier to handle this  
8 traffic. There is no operational or economic justification for forcing Level 3  
9 and other CLECs to duplicate facilities which are already in place and  
10 available – indeed, they are being used today for this purpose. Further, given  
11 the lack of commercially reasonable alternatives for CLECs, SBC would have  
12 no incentive in a “commercial negotiation” to provide Level 3 with reasonable  
13 rates, terms and conditions for transit. In fact, SBC would have strong  
14 incentives to exploit its historical role as the monopoly provider of this  
15 critical functionality.

16 SBC has in no way been financially harmed by providing transiting  
17 service. The testimony does not suggest otherwise. There is no reason to  
18 suspect that SBC would be hurt if it were required to continue providing  
19 transiting services in the current environment. The unnecessary duplication  
20 of facilities that could be required if SBC prevailed on this issue constitutes

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<sup>16</sup>McPhee Direct at 20.

1 an extremely inefficient use of society's scarce resources. Such a result can  
2 be directly linked to upward pressure on retail rates in Missouri. In short,  
3 both economic efficiency and operational stability support the maintenance  
4 of the status quo with respect to SBC's transiting obligations.

5 **Q. HOW IS SBC COMPENSATED FOR THE TRANSIT FUNCTIONS IT**  
6 **PROVIDES?**

7 A. This Commission has approved SBC's various transit rates. Mr. McPhee  
8 notes at page 21 of his direct testimony that existing interconnection  
9 agreements contain rates for transiting, and SBC would now increase the rate  
10 for transit traffic above the threshold of 13 million minutes per month. A  
11 tiered rate structure is nothing new. In fact, the industry has provided a tiered  
12 rate structure for transport for years. The difference with SBC's proposed  
13 transit rates is that instead of decreases with additional volume, SBC proposes  
14 to increase rates. This is completely contrary to the industry standard of  
15 providing discounts for increases in volumes. Volume discounts can reflect  
16 efficiencies that are usually realized with increased volumes.

17 **Q. HAS SBC EXPLAINED WHY ITS RATES GO UP WITH VOLUME**  
18 **INSTEAD OF DOWN?**

19 A. Yes. Mr. McPhee states at page 21 of his direct testimony that SBC's  
20 proposal increases the rates to give CLECs an incentive to build their own  
21 facilities and to pay for new tandem facilities. Why SBC would want rivals

1 to have incentives to expand their facilities isn't clear. Instead, this rate  
2 structure suggests that there is no effective competition for SBC's transiting  
3 service. Only a monopoly provider would consider increasing rates for  
4 customers as their volumes increased. In a competitive market, carriers  
5 normally decrease rates to reflect cost savings and to retain larger customers  
6 that typically have better access to alternatives.

7 **Q. DOES AN INCREASING TIERED RATE STRUCTURE MAKE SENSE**  
8 **TO PAY FOR NEW TANDEM FACILITIES?**

9 A. No. First, if the existing rates were calculated on a TELRIC basis, they  
10 include each unit of traffic's contribution to the eventual exhaust of all  
11 facilities involved, including tandem switches. In that case, no increase is  
12 justified by point to the use of tandem facilities. Second, without regard to  
13 the *level* of rates, an increasing block rate *structure* is backwards from the  
14 point of view of designing rates that lead users to take into account the costs  
15 of their actions – specifically, the cost of eventual exhaust of tandems. This  
16 is because a large number of small CLECs use more tandem capacity (in trunk  
17 ports) than a single large CLEC with the same number of minutes of transit  
18 traffic per month, but if the volume of traffic exceeds the 13 million minute  
19 threshold, the price is higher in the alternative that weighs less heavily on  
20 tandem capacity.

21 **Q. PLEASE SUMMARIZE YOUR POSITION.**

1       A.     SBC should not be allowed to refuse traffic bound for a third party, or what  
2             amounts to the same thing, exploit its monopoly heritage when setting prices for  
3             transit service. All carriers involved in providing local exchange traffic are  
4             required as part of their common carriage responsibilities to carry traffic  
5             delivered to them to either the ultimate end-user or to another carrier for  
6             termination. SBC has provided this transiting function in the past and should  
7             continue to do so going forward as part of the interconnection agreement.

8             **REGARDING THE TESTIMONY OF JEANNIE HARRIS**  
9             ***ESP Exemption and Interconnection Facilities***

10       **Q.     MS. HARRIS STATES AT PAGE 7 OF HER TESTIMONY THAT**  
11             **“PROVIDERS OF IP-PSTN SERVICES, LIKE ALL USERS OF ACCESS**  
12             **SERVICES, ARE SUBJECT TO THE OBLIGATION TO PAY INTRASTATE**  
13             **AND INTERSTATE ACCESS CHARGES WHEN THEY SEND TRAFFIC TO**  
14             **THE PSTN, UNLESS SPECIFICALLY EXEMPTED FROM DOING SO.” DO**  
15             **YOU AGREE?**

16       A.     No. It appears that Ms. Harris recognizes the ESP exemption from interstate access  
17             charges in some, unspecified circumstances, but would deny that the exemption  
18             applies to IP-PSTN traffic received from Level 3. This approach would apparently  
19             have the perverse effect of only allowing the exemption when an ESP exchanges  
20             traffic directly with an ILEC. Using SBC’s theory, when an ESP used a CLEC to  
21             exchange the same traffic with an ILEC it would be subject to access charges. This

1 is obviously not what the FCC intended and is clearly inconsistent with the intent  
2 of the Act. Such a result would eliminate competition as opposed to encouraging  
3 competition.

4 **REGARDING THE TESTIMONY OF TIMOTHY OYER**  
5 ***FX-Like or Virtual NXX Service***

6 **Q. AT PAGE 59 OF MR. OYER’S TESTIMONY HE STATES, “LEVEL 3’S**  
7 **VIRTUAL NXX, ON THE OTHER HAND, PLACES THE RESPONSIBILITY**  
8 **FOR DELIVERING THE CALL FROM AN END USER IN THE FOREIGN**  
9 **EXCHANGE TO THE VNXX END USER ONTO SBC MISSOURI.” IS THAT**  
10 **CORRECT?**

11 A. No. The FX-like or VNXX calls are local calls and they are routed by SBC to the  
12 CLEC’s POI like all other local calls placed by an SBC subscriber to a CLEC  
13 subscriber. Delivering the call from its POI to its customer’s premises is entirely the  
14 CLEC’s responsibility, contrary to Mr. Oyer’s statement. These calls do not change  
15 SBC’s interconnection obligations or change its call handling or costs in any way.  
16 Simply because an FX or FX-like call is interexchange – which by definition all FX  
17 calls are – does not turn the call into a “toll call” as suggested in Mr. Oyer’s next  
18 sentence. Further, insofar as the VNXX customer is an ISP, as in Mr. Oyer’s  
19 examples, the call is jurisdictionally interstate but falls under the ESP exception for  
20 the purposes of assessing access charges, as discussed above.

1       **Q.     AT PAGES 52 AND 53 MR. OYER DESCRIBES THE ILEC’S HANDLING OF**  
2       **A VNXX CALL AND CONCLUDES THAT “THE ILEC IS NOT**  
3       **COMPENSATED FOR DELIVERING THIS CALL.” IS THIS CORRECT?**

4       A.    No. When an ILEC handles a call from its subscriber to a CLEC subscriber it  
5       delivers that call to the appropriate CLEC’s POI. It is compensated for this role by  
6       its end user, typically in the form of a monthly flat charge. When an end user pays  
7       his or her monthly bill, they have compensated the ILEC for delivering calls directly  
8       to the premises of the ILEC’s other subscribers in the same local calling area, and to  
9       the POI of the appropriate CLEC in the case of a call to a CLEC’s subscriber. The  
10      ILEC’s action in delivering such a call to the CLEC’s POI is no different if the  
11      CLEC’s subscriber is located across the street from the ILEC subscriber that  
12      originated the call or if the CLEC’s subscriber is an ISP across the country. It is  
13      emphatically not the case that the ILEC is not compensated for delivering the call  
14      Mr. Oyer describes to the CLEC’s POI. Indeed, in the case of local calls, the ILEC  
15      is compensated by its end user’s monthly rates to deliver the call all the way to the  
16      called end user. If the called end user is a CLEC subscriber, then the ILEC pays  
17      reciprocal compensation for the CLEC to complete the task that the ILEC was  
18      compensated for by its end users monthly rates. Further, to focus on the geographic  
19      location of the called party, when that recipient of the call will receive the call in IP  
20      format, fosters a confusion as to the nature of IP enabled calls. If the recipient of the  
21      call is a PSTN subscriber, the assigned phone number is associated with a particular



1 loop – buried in the ground and stapled to the side of a building. This is not the case  
2 at all for a call delivered to an end user that accepts the call in IP format. Such a  
3 called party may indeed be physically located in the geographic area that the ILEC  
4 thinks of as “local” for that NPA-NXX, or they may not. Such a subscriber may  
5 move from one location to another – into or out of the local calling area - without  
6 reporting the change. In fact, the geographic location of such a subscriber does not  
7 matter – certainly it doesn’t matter to the ILEC of an originating caller whose call  
8 must clearly be delivered to the POI of the CLEC to which the number is registered.

9 **Q. DOES LEVEL 3’S SERVICE PROVIDE THE SAME FUNCTIONALITY FOR**  
10 **CONSUMERS AS THE FX AND FX-TYPE SERVICES PROVIDED BY SBC**  
11 **AND OTHER ILECS?**

12 A. Yes, it does. Like ILEC FX services (and similar, alternative FX-type services  
13 offered by ILECs), Level 3 provides the customer the ability to obtain a “virtual”  
14 presence in a local calling area where the customer is not physically located. Level  
15 3’s service is a competitive response to the traditional LEC FX service. In fact, in  
16 considering this question, many states have found that it provides the same  
17 functionality to consumers as the FX service has provided for decades.

18 In a proceeding in Florida, the Commission Staff concluded the following:

19 [CLEC] witness Selwyn [states] that the practice of terminating a  
20 call in an exchange that is different than the exchange to which the  
21 NPA/NXX is assigned is nothing new. He contends that ILECs  
22 have been providing this service for decades through their [Foreign  
23 Exchange] service. Staff agrees. **Staff believes that virtual NXX**

1                   **is a competitive response to FX service, which has been offered**  
2                   **in the market by ILECs for years.**<sup>17</sup> (emphasis added)

3                   Likewise in Kentucky, the Commission also equated ILEC FX and Level 3 service  
4                   as follows:

5                   Both utilities offer a local telephone number to a person residing  
6                   outside the local calling area. BellSouth's service is called  
7                   foreign exchange ("FX") service and Level 3's service is called  
8                   virtual NXX service.<sup>18</sup>

9                   **Q.     DO ILECS AROUND THE COUNTRY OFFER SIMILAR SERVICES TO**  
10                  **THEIR CUSTOMERS AND THE ISP INDUSTRY?**

11                  A.     Yes.   Each of the RBOCs offers services that are targeted directly at the ISP  
12                  industry and intended to provide similar advantages to Level 3's service.

13                  ***SBC's Virtual Offerings***

14                  **Q.     DOES SBC OFFER SERVICES FOR ISPS, AND IN PARTICULAR, A**  
15                  **SERVICE SIMILAR TO VNXX OFFERINGS DISCUSSED ABOVE?**

16                  A.     Yes.   In addition to standard offerings such as FX, extended area service and remote  
17                  call forwarding, SBC offers its "PremierSERV Hosted IP Communication Service"  
18                  or HIPCS service.   And of course SBC Yahoo! Dial provides Internet access to  
19                  consumers in much the same manner as Level 3's dial-up offering.   Further, SBC

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<sup>17</sup> Memorandum to Director, Division of the Commission Clerk & Administrative Services, from Division of Competitive Services and Division of Legal Services, Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Issue 15(b), Staff Analysis (Fl. P.S.C. Nov. 21, 2001) (emphasis added).

<sup>18</sup> *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order (Ky. PSC March 14, 2001) at 7.

1 offers its OmniPresence Virtual Point of Presence service in the former Ameritech  
2 states, but not in Missouri. This “virtual” point of presence service is touted by  
3 SBC as follows:

4 *A LATA-wide service which allows you to virtually appear in*  
5 *multiple CO's. ... For a fixed monthly fee, you can establish a*  
6 *remote Point of Presence without investing in costly network*  
7 *equipment, real estate and leased lines back to the hub location.*  
8 *OmniPresence lets you break into new markets and offer your*  
9 *customers a local call.<sup>19</sup> (Emphasis in original)*

10 So, as you can see, this is yet another example of services provided to ISPs for the  
11 purpose of providing local dial-up access for consumers in areas where the ISPs  
12 may or may not have a physical presence. More importantly, this service is an  
13 example of SBC providing a “virtual” presence in multiple calling areas on a “local  
14 call” basis. As such, Mr. Oyer’s focus on the “virtual” nature of Level 3’s service  
15 applies equally to SBC offerings.

16 **Q. DO THESE ILEC SERVICES PROVIDE THE SAME FUNCTIONALITY AS**  
17 **LEVEL 3’S SERVICE?**

18 A. Yes. The ILEC services provide the same functionality as Level 3. These ILEC-  
19 provided FX-type services provide the customer a local number in a local calling  
20 area where the customer is not physically located, permitting the customer to  
21 establish a “virtual” presence in that local calling area without incurring the  
22 expense of deploying additional facilities in that area.

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<sup>19</sup> See SBC Website for ISP Solutions; <http://www.sbc.com/gen/isp?pid=2573>

1       **Q.     DOES THIS CONCLUDE YOUR TESTIMONY?**

2       **A.     Yes, it does.**

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Level 3 Communications, )  
LLC's Petition for Arbitration Pursuant to )  
Section 252(b) of the Communications Act of )  
1934, as amended by the Telecommunications )  
Act of 1996, and the Applicable State Laws for )  
Rates, Terms, and Conditions of )  
Interconnection with Southwestern Bell )  
Telephone Company, L.P., d/b/a SBC Missouri. )

Case No. TO-2005-0166

**AFFIDAVIT**

Dr. Richard Cabe, of lawful age, being duly sworn upon his oath, deposes and states the following:

1. My name is Richard Cabe. I am employed by Richard Cabe, Inc. as President.
2. Filed herewith and made a part hereof for all purposes is my Rebuttal Testimony in this case.
3. I hereby affirm that my testimony filed herewith, including all answers to the questions therein, is true and correct to the best of my knowledge, information and belief.

Signed:

Richard Cabe  
Richard Cabe

Subscribed and sworn to before me this 4<sup>th</sup> day of February 2005.

Stephanie Bailey Notary Public

My Commission expires: 9/17/2008

