

Exhibit No:  
Issues: UNE-1, GTC-4  
Witness: Michael D. Silver  
Type of Exhibit: Direct Testimony  
Sponsoring Party: Southwestern Bell  
Telephone, L.P., d/b/a/  
SBC Missouri  
Case No: TO-2005-0166

SOUTHWESTERN BELL TELEPHONE, L.P.,  
d/b/a SBC MISSOURI

CASE NO. TO-2005-0166

DIRECT TESTIMONY

OF

MICHAEL D. SILVER

Chicago, Illinois  
January 24, 2005

**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 ) Case No. TO-2005-0166  
Applicable State Laws for Rates, Terms and )  
Conditions of the Interconnection with Southwestern )  
Bell Telephone Company, L.P., d/b/a SBC Missouri )

**AFFIDAVIT OF MICHAEL SILVER**

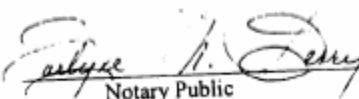
STATE OF ILLINOIS     )  
                                  )  
COUNTY OF COOK     )

I, Michael Silver, of lawful age, being duly sworn, depose and state:

1. My name is Michael Silver. I am presently Associate Director-Wholesale Marketing for Ameritech Services, Inc.
2. Attached hereto and made a part hereof for all purposes is my Direct Testimony.
3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_  
Michael Silver

Subscribed and sworn to before me this 9 day of January, 2005.

  
\_\_\_\_\_  
Notary Public  
*EARLYNE M. BERRY*

My Commission Expires: 10-04-05



## **TABLE OF CONTENTS**

	<b><u>Page(s)</u></b>
I. Introduction and Summary .....	1
II. Purpose of Testimony .....	1
III. Level 3's UNE Proposal .....	2
IV. Problems with Level 3's Proposal .....	3
V. SBC Missouri' UNE Proposal (UNE DPL Issue 1; GTC Definitions Issue 4) .....	6
VI. Summary .....	11

### **Attachments**

Attachment MS-1 – Education, Work Experience, and Job Duties of  
Michael D. Silver

Attachment MS-2 – Interim Order Exclusion Temporary Rider

**I.**  
**INTRODUCTION AND SUMMARY**

**Q. PLEASE STATE YOUR NAME AND YOUR BUSINESS ADDRESS.**

A. My name is Michael D. Silver. My business address is 350 N. Orleans, Chicago, IL 60654.

**Q. HAVE YOU PREPARED AN APPENDIX SUMMARIZING YOUR EDUCATION, WORK EXPERIENCE, AND CURRENT JOB RESPONSIBILITIES?**

A. Yes. Attachment MS-1 summarizes my education, work experience, and current job responsibilities.

**II.**  
**PURPOSE OF TESTIMONY**

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

A. My testimony addresses the single unbundled network elements (“UNE”) issue in this arbitration, UNE Issue 1, which relates to whether the terms and conditions for providing UNEs found in the parties’ existing interconnection agreement (“ICA”) should be carried forward into the new ICA, as Level 3 proposes, or whether the successor ICA being arbitrated in this proceeding should reflect the impact of the Federal Telecommunication Commission’s (“FCC’s”) *Triennial Review Order* (“TRO”), and the further “declassification” (i.e., removal of the unbundling requirement) of additional network elements as a result of the D.C. Circuit Court of Appeals’ decision on review of the *TRO* (“*USTA II*”).<sup>1</sup> I also address SBC Missouri’ proposal for how to recognize the FCC’s

---

<sup>1</sup> See *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

1 recent *Interim Order*<sup>2</sup> on unbundling requirements. UNE Issue 1 also effectively  
2 encompasses GTC Definitions Issue 4.

3 **Q. DOES YOUR TESTIMONY TAKE THE FCC'S DECEMBER 15, 2004 PRESS**  
4 **RELEASE ANNOUNCEMENT OF NEW UNBUNDLING RULES INTO**  
5 **CONSIDERATION?**

6 A. No. Although the FCC announced on December 15, 2004, that it would issue new  
7 unbundling rules, as of the date of this filing, the FCC has issued no order. Accordingly,  
8 no new rules are yet in effect, nor do we have sufficient detail to know exactly what those  
9 rules will provide. Suffice it for now to say that when any FCC final unbundling rules  
10 become effective, the language of the SBC Missouri' proposed UNE Appendix allows for  
11 the ICA to be conformed to any such order.

12 **III.**  
13 **LEVEL 3'S UNE PROPOSAL**  
14

15 **Q. WHAT IS YOUR UNDERSTANDING OF LEVEL 3'S PROPOSAL FOR THE**  
16 **UNE APPENDIX IN THIS ARBITRATION?**

17 A. My understanding of Level 3's proposal for the UNE Appendix is that the terms and  
18 conditions found in the current ICA between SBC Missouri and Level 3 should be carried  
19 forward into the new ICA, and remain there until the FCC has issued new permanent  
20 unbundling rules. At that time, the parties would negotiate and/or litigate a replacement  
21 UNE Appendix in light of then-existing law (presumably including permanent UNE rules  
22 to be promulgated by the FCC) pursuant to the dispute resolution provisions in this ICA.

---

<sup>2</sup> See Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (FCC rel. Aug. 20, 2004) ("*Interim Order*").

IV.  
**PROBLEMS WITH LEVEL 3'S PROPOSAL**

**Q. WHY SHOULD THIS COMMISSION REJECT LEVEL 3'S PROPOSAL TO RETAIN THE CURRENT ICA'S UNE APPENDIX TERMS AND CONDITIONS IN THE NEW ICA?**

A. There are three main problems with Level 3's proposal. First, it is precluded by the FCC's *Interim Order*. Second, it would perpetuate unbundling requirements and terms and conditions that are not affected by the *Interim Order* and that do not comply with the current, controlling law. Third, by requesting a second phase of this arbitration at some indefinite date in the future, it would make impossible this Commission's task of concluding this proceeding and creating a successor ICA anywhere close to the timelines required by Section 252(b) of the Federal Telecommunications Act.

**Q. HOW IS LEVEL 3'S PROPOSAL PRECLUDED BY THE FCC'S *INTERIM ORDER*?**

A. Level 3's existing ICA allows it to obtain unbundled local circuit switching for mass market customers as well as high-capacity UNE loops and unbundled dedicated transport. While the *Interim Order* allows CLECs to continue to obtain those items as UNEs for a limited time (even though *USTA II* vacated any requirement to unbundle them) (*Interim Order*, ¶ 1), the FCC also expressly stated that CLECs could *not* obtain terms and conditions for those former UNEs as part of *new* ICAs like the one being arbitrated here. *Interim Order*, ¶ 23 (“[T]he interim approach forecloses the implementation and propagation of the vacated rules. . . . [I]f the vacated rules were still in place, competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers’ new contracts. The interim approach adopted here, in contrast, *does not enable competing carriers to do either*”) (emphasis added). Thus,

1 Level 3 is precluded from requesting or obtaining such terms and conditions as part of its  
2 new ICA.

3 **Q. PLEASE CLARIFY WHAT YOU MEAN WHEN YOU SAY THAT THE FCC’S**  
4 **INTERIM ORDER ALLOWS CLECS TO OBTAIN CERTAIN ITEMS AS UNES**  
5 **FOR A LIMITED TIME?**

6 A. The *Interim Order* clearly states that incumbent local exchange companies (“ILECs”)  
7 must provide the former UNEs listed in the *Interim Order* under ICAs that were in effect  
8 as of June 15, 2004, but only “until the earlier of the effective date of final unbundling  
9 rules promulgated by the Commission or six months after Federal Register publication of  
10 [the Interim] Order, except to the extent that they have been superseded by (1) voluntarily  
11 negotiated agreements, (2) an intervening [FCC] order affecting specific unbundling  
12 obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with  
13 respect to rates only) a state public utility commission order raising the rates for network  
14 elements.” *Interim Order*, ¶ 1. Thus, even if Level 3 could request to have declassified  
15 UNEs included in a new ICA (which it cannot under ¶ 23 of the *Interim Order*), Level 3’s  
16 proposal is improper because it does not reflect this critical time limitation set by the  
17 FCC.

18 **Q. CAN YOU GIVE ANY EXAMPLES OF OTHER TERMS AND CONDITIONS**  
19 **FOUND IN THE CURRENT ICA THAT ARE NOT CONSISTENT WITH**  
20 **CURRENT RULES?**

21 A. Yes. Although I am not an attorney, it appears to me that there are several other terms  
22 and conditions in the current ICA that would no longer be appropriate or permissible in  
23 light of *TRO* and *USTA II* and that are not salvaged by the *Interim Order*. Among those  
24 are the following:

- The existing ICA does not distinguish between unbundled local switching for mass market and enterprise market customers, even though the *TRO* drew such a distinction and the *Interim Order’s* temporary standstill requirement applies to mass market switching

only. *Interim Order*, ¶ 1 n.3. After the *TRO*, SBC Missouri has no obligation to provide unbundled enterprise market switching and, especially since *USTA II* upheld that declassification, imposing such a duty would be inconsistent with the *TRO*. (The language in Section 9.2.4 of the existing Appendix UNE deals only with the ULS carve-out from the *UNE Remand Order*, which is more limited than the complete removal under the *TRO* of any duty to provide unbundled enterprise market switching);

- The existing ICA requires SBC Missouri to provide unbundled OCn loops (Appendix UNE, § 7.1), but the *TRO* held that OCn loops must no longer be unbundled (¶ 315), that determination was undisturbed by *USTA II*, and OCn loops therefore are not part of the “enterprise market loops” covered by the *Interim Order*;
- The existing ICA does not restrict Level 3 to obtaining only 12 unbundled DS3 dedicated transport circuits along a single route (see Appendix UNE, § 10.3), but the *TRO* (¶ 388) contains such a restriction, and the *Interim Order* does not affect that restriction;
- The existing ICA requires SBC Missouri to provide unbundled dedicated transport at the OC3, OC12, and OC48 level (Appendix UNE, § 10.3.2), even though the *TRO* held that CLECs are not impaired by a lack of access to such dedicated transport at those levels (¶ 389), that determination was undisturbed by *USTA II*, and the *Interim Order* temporary standstill does not apply to unbundled dedicated transport at the OC3 level or above;
- The existing ICA’s provisions on unbundled shared transport (Appendix UNE, § 9.6) and call-related databases that determination was undisturbed by *USTA II*, (Appendix UNE, § 12) do not make clear that the duty to unbundle those elements exists, under the *TRO* and *Interim Order*, only where Level 3 is also purchasing unbundled mass market local circuit switching. 47 C.F.R. § 51.319(d)(4). As a result, the unbundling provisions in the current ICA are overbroad, even under the *Interim Order* (the *Interim Order* would allow CLECs to have access to shared transport and call-related databases (other than 911) *only* in conjunction with the purchase of unbundled mass market local circuit switching. See *Interim Order*, ¶ 1 n.3);
- The existing ICA would require unbundling of entrance facilities (Appendix UNE, § 10.3.3.2) as unbundled dedicated transport, even though the *TRO* redefined dedicated transport to exclude entrance facilities (¶¶ 365 ff.);
- The existing ICA does not reflect the limits on the scope of SBC Missouri’ duty to combine UNEs for Level 3, as set forth in *Verizon Comms. Inc. v. FCC*, 535 U.S. 467, 534-36 (2002) and the *TRO* (¶ 574);



- The existing ICA contains no provisions regarding commingling or the limits on commingling as set forth in the *TRO* (e.g., 47 C.F.R. § 51.318);
- The existing ICA contains provisions on the “conversion” of special access services to UNEs (Appendix UNE § 15), but those provisions are based on the FCC’s *Supplemental Order* and *Supplemental Order Clarification*, which clarified the *UNE Remand Order*. The *TRO* established an entirely new set of criteria for special access conversions (47 C.F.R. § 51.318), and those criteria are not reflected in the existing ICA; and
- The existing ICA’s provisions on routine facilities modifications are not up-to-date with the law on routine facilities modifications as set forth in the *TRO* (§§ 632-48) and 47 C.F.R. § 51.319(e)(5).

**Q. GIVEN THE POINTS YOU RAISE, WHAT SHOULD THE COMMISSION DO?**

A. The Commission must reject Level 3’s proposal to incorporate the UNE Appendix from the parties’ existing ICA into the new ICA, because such an incorporation (apart from the fact that it is legally precluded by the *TRO*, *USTA II*, or the *Interim Order* ¶ 23, as I explained above) would import into the new contract a host of provisions that are clearly not supported by current law.

**Q. HOW, THEN, IS SBC MISSOURI PROPOSING THAT THE COMMISSION ALLOW LEVEL 3 TO AVAIL ITSELF OF THE RIGHTS THAT IT DOES HAVE UNDER THE *INTERIM ORDER*?**

A. As I explain in the following section, SBC Missouri proposes that if the parties’ new ICA goes into effect during the time period covered by the *Interim Order*, the ICA should include a rider that memorializes its rights under its previous ICA per the *Interim Order*.

**V.**

**SBC MISSOURI’ UNE PROPOSAL (UNE DPL ISSUE 1; GTC DEFINITIONS ISSUE 4)**

**Q. WHAT IS SBC MISSOURI PROPOSING FOR THE UNE APPENDIX?**

A. SBC Missouri is proposing language that reflects the reality that the rules for unbundling have changed dramatically since the existing ICA was negotiated and arbitrated between

1 SBC Missouri and Level 3 and approved by the Commission in 2001.<sup>3</sup> In May of 2002,  
2 the *USTA I* decision (290 F.3d 415) vacated the unbundling rules established in the *UNE*  
3 *Remand Order*. In August 2003, the FCC issued the *TRO*, which determined, among  
4 other things, that certain network elements were no longer required to be offered as  
5 UNEs. The *USTA II* decision vacated a number of the FCC's rules issued in the *TRO*,  
6 thereby having the effect of declassifying additional network elements as UNEs.  
7 Consistent with the *TRO* and *USTA II*, SBC Missouri is proposing to exclude all  
8 declassified network elements from the new ICA. Such network elements would not be  
9 included in the UNE Appendix, the Pricing Appendix, or the Pricing Schedule. Under  
10 SBC Missouri's proposal, this UNE Appendix would take effect upon approval by the  
11 Commission. However, if the *Interim Order* is still in effect, and the new ICA's effective  
12 date occurs sooner than the earliest of (1) the effective date of final unbundling rules  
13 adopted by the FCC in the proceeding opened by the *Notice of Proposed Rulemaking*  
14 ("*NPRM*") appended to the *Interim Order*, (2) six months from the date the FCC's  
15 *Interim Order* was published in the Federal Register (March 13, 2005), then SBC  
16 Missouri proposes that a "Rider" (as described below) be added to the new ICA to take  
17 into account the *Interim Order*'s standstill provisions pursuant to the *Interim Order*'s  
18 terms.

19 **Q. WHICH NETWORK ELEMENTS SHOULD BE CONSIDERED**  
20 **DECLASSIFIED?**

21 A. At a minimum, the following network elements, which previously were considered  
22 UNEs, were either declassified or made subject to declassification based upon the *TRO*.

---

<sup>3</sup> See April 6, 2001 Order Approving Interconnection Agreement between Level 3 and SBC Missouri, Docket No. 22441.

For each element that was subsequently impacted by the *USTA II* decision, I have added a sub-bullet to describe the practical impact:

- any Unbundled Dedicated Transport (“UDT”) (or dark fiber transport) facility (e.g., entrance facilities) that does not meet the definition set forth by the FCC’s *TRO*, which says UDT is “those transmission facilities connecting incumbent LEC switches and wire centers within a LATA” (*TRO*. 365);
  - *USTA II* impact: *TRO* transport unbundling rules are vacated, meaning transport is no longer required to be unbundled at any level;
- any UDT or dark fiber transport facility not contained within the *TRO*’s definition of UDT at 51.319(e) (e.g. DSO Transport);
  - *USTA II* impact: *TRO* transport unbundling rules are vacated, meaning transport is no longer required to be unbundled at any level;
- DS1 and DS3 Dedicated Transport, DS1 and DS3 UNE Loop, or Dark Fiber Transport where there’s been a finding of non-impairment;
  - *USTA II* impact: *TRO* transport and DS1/DS3/dark fiber loop unbundling rules are vacated, meaning all transport, hi-cap loops and dark fiber loops and transport are no longer required to be unbundled;
- Enterprise Market ULS as defined in Section 5.7 of Appendix UNE;
- Mass market ULS as defined in Section 5.6 where there’s been a finding of non-impairment;
  - *USTA II* impact: Mass market switching unbundling rules are vacated, meaning mass market switching is no longer required to be unbundled. With the declassification of mass market switching, SBC Missouri is not required to unbundle any circuit switching and, as a practical matter, this finding eliminates UNE-P;
- OCn Loops and OCn Dedicated Transport;
  - *USTA II* impact: As mentioned above, *TRO* transport and DS1/DS3/dark fiber loop unbundling rules are vacated, meaning all transport, hi-cap loops and dark fiber loops and transport are no longer required to be unbundled;
- the Feeder portion of the Loop;
- Line Sharing (i.e., the HFPL);

- an EEL that does not meet the Mandatory Eligibility Criteria set forth in Section 2.12 of Appendix UNE;
  - *USTA II* impact: *USTA II*'s vacatur of the unbundled dedicated transport rules mean that EELs are no longer available, either.
- any unbundled Call-Related Database, other than the 911 and E911 databases, or unbundled Shared Transport that is not provisioned for use with SBC Missouri's Mass market ULS (as defined in Section 5.6 of Appendix UNE);
  - *USTA II* impact: *USTA II*'s vacatur of the Mass market switching rules means that unbundled access to call-related databases (other than 911 and E911 databases), or shared transport is effectively no longer required;
- SS7 signaling that is not provisioned with use with mass market ULS (as defined in Section 5.6);
  - *USTA II* impact: *USTA II*'s vacatur of the mass market switching rules means that access to SS7 signaling is effectively no longer required;
- Packet switching, including routers and DSLAMs;
- the packetized bandwidth, features, functions, capabilities, electronics, and other equipment used to transmit packetized information over Hybrid Loops (as defined in 47 C.F.R. § 51.319(a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities;
- Fiber to the Home ("FTTH") Loops, except to the extent that SBC Missouri has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case SBC Missouri will provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH loop on an unbundled basis; and
- any other network element or class of network elements where there has been a finding that unbundling is not required, or any network element or class of network elements where there has been no impairment finding.

**Q. HOW DOES SBC MISSOURI PROPOSE TO RECOGNIZE THE FCC'S *INTERIM ORDER* IN THIS PROCEEDING?**

A. Level 3 claims its new proposal on UNEs is based on the *Interim Order*. As explained above, however, the *Interim Order* does not allow Level 3 to request unbundling of declassified UNEs as part of a new ICA, and Level 3's existing ICA also includes several

1 unbundling requirements to which it has no right, even under the *Interim Order*. As a  
2 more rational approach – one that would give Level 3 the full benefits of the *Interim*  
3 *Order* without leading to the lengthy propagation of unlawful unbundling requirements  
4 SBC Missouri would offer to include a Rider to the new ICA that would allow Level 3, in  
5 the parties’ successor (new) ICA, to continue to obtain the network elements referenced  
6 in the *Interim Order* as UNEs under the terms and conditions of its existing (old) ICA  
7 until the earliest of (1) the effective date of final unbundling rules adopted by the FCC in  
8 the proceeding opened by the *Notice of Proposed Rulemaking* (“*NPRM*”) appended to  
9 the *Interim Order*; (2) six months from the date the FCC’s *Interim Order* was published  
10 in the Federal Register (March 13, 2005); or (3) if the *Interim Order* is withdrawn,  
11 vacated, or stayed, or otherwise determined to be invalid, the date it is withdrawn,  
12 vacated, stayed, or otherwise determined to be invalid. A sample of this *Interim Order*  
13 Exclusion Temporary Rider is provided for reference (*see* Attachment MS-2).

14 **Q. WHAT TERMS AND CONDITIONS WOULD SBC MISSOURI PROPOSE TO BE**  
15 **APPLICABLE IF THE NEW ICA HAS NOT BECOME EFFECTIVE AT THE**  
16 **TIME THE PROPOSED RIDER HAS EXPIRED?**

17 A. The *Interim Order* Exclusion Temporary Rider is designed to be added to the new ICA to  
18 cover any period of time between the effective date of the new ICA and the expiration of  
19 the FCC’s first interim period (six months from the date the *Interim Order* was published  
20 or the publication of permanent unbundling rules, whichever is earlier). If the successor  
21 ICA is not effective before the expiration of that interim period, the Rider would no  
22 longer be necessary or appropriate, and SBC Missouri’s Rider proposal would be moot.

23 **Q. WOULD IT BE MORE APPROPRIATE IN THAT SITUATION TO SIMPLY**  
24 **CONTINUE WITH THE TERMS AND CONDITIONS UNDER THE ICA THAT**  
25 **IS IN PLACE TODAY?**

1 A. No. For the reasons explained above, there is no support for perpetuating the outdated  
2 requirements, terms, and conditions of the existing ICA, many of which are no longer  
3 obligations under controlling law. It is possible that the existing ICA may be amended in  
4 the next few months to bring it into compliance with the current law, but it is unknown  
5 when that will occur. If the existing ICA has not been so amended, the proper course  
6 would be to adopt SBC Missouri' proposed Appendix UNE pending any further  
7 negotiations that might be necessary to implement the FCC's permanent unbundling rules  
8 when they take effect.

9  
10 **VI.**  
11 **SUMMARY**

12 **Q. WHY SHOULD THE COMMISSION ADOPT SBC MISSOURI' PROPOSAL?**

13 A. SBC Missouri' proposal to adopt a UNE Appendix reflecting what have been determined  
14 to be lawful UNEs is preferable to Level 3's proposal to carry forward the terms and  
15 conditions from the existing (old) ICA into the successor (new) ICA. In the first place,  
16 SBC Missouri' proposal is consistent with the ruling in the *Interim Order* that Level 3 is  
17 not entitled to continue to obtain network elements as UNEs after the rules requiring SBC  
18 Missouri to provide such elements as UNEs have expired. It also ensures that the terms  
19 governing UNE combinations, commingling, routine network modifications, and the like  
20 reflect the current governing law. Level 3, by contrast, seeks language that would enable  
21 it to keep obtaining the declassified UNEs even after the *Interim Order* expires, even  
22 though the FCC expressly said in the *Interim Order* that such an approach was not  
23 allowed.

1                    Additionally, SBC Missouri's proposal ensures that Level 3 will continue to have  
2                    access to the items listed in the *Interim Order* during the limited period in which Level 3  
3                    allegedly is entitled to such access.

4    **Q.    DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

5    A.    Yes, it does.