

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

In the Matter of the Application of Level 3)
Communications, LLC, and Southwestern)
Bell Telephone Company, LP d/b/a SBC)
Missouri for Approval of their Negotiated)
Interconnection Agreement and)
Superseding Amendment under Section)
252(e)(1) of the Telecommunications Act.)

Case No. TK-2005-0285

STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”) and states:

1. On December 13, 2004, Level 3 Communications, LLC (“Level 3”) filed a petition requesting that the Commission arbitrate an interconnection agreement between Level 3 and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri (“SBC”). *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, to establish an Interconnection Agreement with Southwestern Bell Telephone Company, LP d/b/a SBC Missouri*, Case No. TO-2005-0166. The case was closed after Level 3 and SBC submitted a negotiated interconnection agreement. The present case was opened to allow the Commission to approve or reject that negotiated interconnection agreement as provided in Section 252(e) of the Telecommunications Act.

2. In Case No. TO-2005-0166, one disagreement between Level 3 and SBC concerned transiting traffic language. Transit traffic is traffic delivered by Level 3 to SBC and transited by SBC to a third-party carrier. Level 3 maintained that the interconnection agreement between Level 3 and SBC should contain the terms and conditions governing transiting traffic. Level 3 stated:

Section 251(a)(1) of the Federal Act requires every telecommunications carrier, including SBC, to interconnect directly or indirectly with each other telecommunications carrier. Transit Traffic would constitute such interconnection.¹

In testimony filed in the arbitration proceeding, a Level 3 witness claimed SBC's transiting service "is an integral part of the incumbent's obligations under Section 251(c)(2) of the Act."²

A separate witness stated it is Level 3's position "that the Act imposes an obligation on SBC to include transit traffic in its interconnection agreement with Level 3."³

3. In SBC's filed testimony in the arbitration proceeding SBC argued that transit traffic is not within the scope of an interconnection agreement:

[T]ransiting service relates solely to Level 3's efforts to compel SBC Missouri to serve as an intermediary by transporting traffic between Level 3 and third party CLECs. Importantly, however, this transiting service does not constitute interconnection with SBC Missouri. Transiting service, which is nothing more than transporting traffic, does not involve "interconnection" with SBC Missouri's network, and SBC Missouri is not required to provide – or negotiate – such service. Transiting service lies beyond the duties set forth in Section 251 and is beyond the Commission's compulsory arbitration jurisdiction.⁴

4. The Commission approved the current interconnection agreement between Level 3 and SBC on November 21, 2001 in Case No. TO-2001-179. That agreement contains transit traffic terms and conditions that are not provided for in the new interconnection agreement.⁵ The new interconnection agreement between SBC and Level 3 appears to lack a complete transit traffic provision. Under normal circumstances the Staff may not have questioned an interconnection agreement lacking detail regarding transiting service. Additional terms and

¹ Level 3 Communications, L.L.C. and Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Joint Revised Statement of Unresolved Issues ("Joint Decision Point List"), January 20, 2005, Case No. TO-2005-0166.

² Rebuttal Testimony of Richard Cabe, Ph.D. on Behalf of Level 3 Communications, LLC, Case No. TO-2005-0166, Filed February 7, 2005, p. 18.

³ Rebuttal Testimony of William P. Hunt on Behalf of Level 3 Communications, LLC, Case No. TO-2005-0166, Filed February 7, 2005, p. 2.

⁴ Rebuttal Testimony of J. Scott McPhee on Behalf of SBC, Case No. TO-2005-0166, Filed January 24, 2005, p. 20.

⁵ The current interconnection agreement has a "Transit Traffic Compensation" section in the Reciprocal Compensation Appendix and also includes a transiting rate in the pricing Appendix that do not appear to be included in the new interconnection agreement.

conditions agreed upon after the Commission approves an interconnection agreement can be incorporated by amendment. However, the testimony filed in the arbitration proceeding shed light on the possibility that the transit service agreement would not be submitted to the Commission for approval. The Staff recommends that the Commission direct the parties to file a response stating whether they intend to include terms and conditions for transit traffic in a separate agreement and whether they intend to file it with the Commission for approval under Section 252(e). If the parties do not intend to file the transit service agreement with the Commission, it may be helpful to direct SBC and Level 3 to separately explain why they are not required to file the agreement with the Commission.

5. The Staff is not convinced by SBC's argument in the arbitration proceeding that the transit traffic provisions do not constitute interconnection with SBC. Transit traffic provisions are routinely made a part of the interconnection agreements filed with the Commission under Section 252(e). SBC's arguments do not explain what has changed to remove transit traffic provisions from interconnection agreements reviewed by this Commission. Absent any legal authority removing transit traffic as an interconnection service under Section 252(e), the Staff recommends that the interconnection agreement be rejected unless the parties submit the transit traffic agreement as an amendment to the interconnection agreement.

6. A recent Federal Communications Commission ("FCC") order discusses the issue of whether transit traffic provisions should be included in interconnection agreements. In the FCC's Further Notice of Proposed Rulemaking released on March 3, 2005 in CC Docket No. 01-92, *In the Matter of Developing a Unified Intercarrier Compensation Regime* ("FNPRM"), the FCC stated that "although many incumbent LECs, mostly BOCs, currently provide transit

service pursuant to interconnection agreements, the [FCC] has not had occasion to determine whether carriers have a duty to provide transit service.”⁶ The FCC further stated:

The record suggests that the availability of transit service is increasingly critical to establishing indirect interconnection - a form of interconnection explicitly recognized and supported by the Act. It is evident that competitive LECs, CMRS carriers, and rural LECs often rely upon transit service from the incumbent LECs to facilitate indirect interconnection with each other. Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks.⁷

Moreover, it appears that indirect interconnection via a transit service provider is an efficient way to interconnect when carriers do not exchange significant amounts of traffic. Competitive LECs and CMRS carriers claim that indirect interconnection via the incumbent LEC is an efficient form of interconnection where traffic levels do not justify establishing costly direct connections. As AT&T explains, “transiting lowers barriers to entry because two carriers avoid having to incur the costs of constructing the dedicated facilities necessary to link their networks directly.” This conclusion appears to be supported by the widespread use of transiting arrangements.⁸

Here the FCC recognizes that transit service is a form of interconnection “explicitly recognized and supported by the Act.” Despite this conclusion, the FCC is currently seeking comment on whether the FCC has the legal authority to impose transiting obligations. The FCC is also seeking comment, assuming it has the necessary legal authority, on whether the FCC should exercise that authority to require the provisioning of transit services. It is clear from the *FNPRM* that the FCC intends to directly address the issue in the near future.

7. With SBC and Level 3 settling their issues from the arbitration proceeding, the parties appear to have resolved their transit traffic issues. However, the Staff believes the transit traffic agreement between SBC and Level 3 should be submitted to this Commission under Section 252(e) of the Telecommunications Act. Without conclusively deciding the issue, the

⁶ *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, released March 3, 2005, at 120.

⁷ *Id.* at 125.

⁸ *Id.* at 126.

FCC's *FNPRM* suggests that transit service is a form of indirect interconnection. Accordingly, the Staff believes it is premature for SBC and Level 3 to determine that they are under no obligation to submit the transit traffic agreement to the Commission for approval.

8. The Commission's authority to approve or reject this interconnection agreement is pursuant to 47 U.S.C. § 252(e) of the Telecommunications Act. Under this section, the Commission may only reject an interconnection agreement adopted by negotiation if: 1) the Commission finds that the agreement discriminates against a telecommunications carrier not a party to the agreement; or 2) the implementation of such agreement is not consistent with the public interest, convenience or necessity.

9. The Staff believes an interconnection agreement is discriminatory and against the public interest if it intentionally omits an interconnection service and provides for that service in a separate agreement not submitted for Commission approval under Section 252. Other carriers may wish to opt into the SBC/Level 3 transit traffic provision under Section 252(i), which states:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

If SBC and Level 3 do not submit the transit traffic agreement for approval as an amendment to the interconnection agreement, carriers wishing to opt into those terms and conditions could be discriminated against if SBC maintains the position that transit service is not subject to the "opt-in" provision of Section 252(i). Furthermore, to the extent transit traffic service is subject to Section 252, the Staff is unable to determine whether the terms and conditions are discriminatory or against the public interest without reviewing the parties' agreement on transit traffic. If the parties maintain that the transit traffic provision does not need to be filed with the Commission, the Staff recommends that the interconnection agreement be rejected for discriminating against

third-party carriers unable to opt into the same terms and conditions agreed to between SBC and Level 3.

10. SBC and Level 3 submitted the interconnection agreement on February 23, 2005. Under Section 252(e)(4), the Commission has until May 24, 2005 to either approve or reject the agreement or the agreement shall be deemed approved.

WHEREFORE, 1) The Staff recommends that the parties be given an opportunity to file the transit traffic provision as an amendment to the interconnection agreement or to separately explain why SBC and Level 3 are not required to file the traffic transit provision with the Commission; and 2) The Staff recommends that the Commission reject the interconnection agreement as discriminatory and against the public interest if the parties do not submit the transit traffic agreement to the Commission for approval under Section 252(e).

Respectfully submitted,

DANA K. JOYCE
General Counsel

/s/ Marc Poston

Marc Poston
Senior Counsel
Missouri Bar No. 45722

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-8701 (Telephone)
(573) 751-9285 (Fax)
marc.poston@psc.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 11th day of April 2005.

/s/ Marc Poston
