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 RESPONSE

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

1. On April 11, 2005, the Staff filed its Recommendation regarding the Interconnection Agreement between Level 3 Communications, LLC ("Level 3") and Southwestern Bell Telephone Company, LP d/b/a SBC Missouri ("SBC"). The Staff recommended that the Commission give the parties an opportunity to file the separate transit traffic provision as an amendment to the Agreement or to explain why they are not required to file the provision with the Commission. The Staff also recommended that the Commission reject the Interconnection Agreement if the parties do not file the transit traffic provision. On April 22, 2005, Level 3 and SBC filed responses to the Staff's Recommendation.

2. The Staff opposes SBC's attempt to sever an interconnection service that has been included in interconnection agreements for the past nine years. Quoting from the FCC's Intercarrier Compensation Further Notice of Proposed Rulemaking, SBC correctly states that the FCC "has not had occasion to determine whether carriers have a duty to provide transit service." SBC argues that "[i]n light of the FCC's open proceeding, this Commission need not attempt to address these questions." This argument is misleading since removing the transit service terms and conditions from interconnection agreements, a service that has been in interconnection

agreements since 1996, is equivalent to taking the position that transit service terms and conditions are not required to be filed with state commissions under the Telecommunications Act of 1996. SBC wants this Commission to change what is to be included in an interconnection agreement before the FCC resolves the issue, while at the same time arguing that the Commission should wait for the FCC to act. For years the industry practice has been to include transit traffic provisions in interconnection agreements and for state commissions to approve or reject the transit traffic provisions under Section 252 of the Act. Without a clear decision by the FCC or Congress declaring transit traffic a form of indirect interconnection that is exempted from inclusion in interconnection agreements, the Staff believes the transit traffic arrangements are required to be submitted to the Commission for approval or rejection.

3. If the FCC chooses not to resolve this transit traffic issue, this Commission has the authority under the Act to conclude that transiting traffic is an indirect form of interconnection subject to Section 251(a)(1). The Commission's authority to make this determination is found in Section 251(d)(3) of the Act, which states that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State commission that…establishes access and interconnection obligations of local exchange carriers."

4. Despite SBC's claims to the contrary, the FCC's Intercarrier Compensation FNPRM clearly states that "the availability of transit service is increasingly critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act."[1] The first requirement of incumbent local exchange carriers such as SBC under Section 251 of the Act is "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). Given this FCC

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, released March 3, 2005, at 125.

statement and the language of the Act, the Staff maintains its position that transit service is a form of indirect interconnection requiring approval from this Commission.

5. Level 3's initial position on this issue is more than likely to be the typical competitive local exchange carrier ("CLEC") position on transit traffic. In the arbitration proceeding, Level 3 clearly took the position that transit service was a form of indirect interconnection and that SBC was obligated to provide for such service in its interconnection agreement with Level 3.[2] However, in Level 3's response to the Staff's recommendation, Level 3 states that it takes no position on the issue. This apparent change may be due to Level 3's interpretation of the provision of the Interconnection Agreement at Section 23.1, which states "[e]ach party covenants and agrees to fully support approval of this Agreement by the Commission or the FCC under Section 252 of the Act without modification."

6. Based on the responses from SBC and Level 3, it is now clear that the parties do not intend to submit the transit service agreement to the Commission for approval under Section 252 of the Act. Instead, the parties intend to submit the agreement to the FCC under Section 211 of the Act.[3] The Staff maintains its position that this is an attempt to remove an interconnection service from SBC's interconnection obligations, which in turn removes the ability of other carriers to opt into interconnection with SBC on the same terms and conditions that SBC provides to another carrier pursuant to Section 252(i) of the Telecommunications Act. Furthermore, to the extent transit traffic service is subject to Section 252, the Staff is unable to determine whether the terms and conditions are not discriminatory against a telecommunications

[2] *See* Staff Recommendation, pp. 1-2.
[3] 47 U.S.C. § 211(a) states: "Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

carrier not a party to the agreement or against the public interest without reviewing the parties' agreement on transit traffic.

7. SBC states that the Staff recently recommended approval of an interconnection agreement between ALLTEL and SBC in Case No. TK-2005-0114 "even though that agreement…provides no rates, terms or conditions associated with transit traffic." The difference between the ALLTEL agreement and the Level 3 agreement is that the Staff is aware of SBC's and Level 3's intention to separately enter into a transit traffic provision and their intention to not file such provision with the Commission. No such intention was apparent when ALLTEL and SBC submitted their Interconnection Agreement. The Table of Contents in the Interconnection Agreement between ALLTEL and SBC gives the misleading appearance that "Transit Traffic" is provided for under Section 7 of that Agreement. Section 7, however, actually addresses "Trunk Data Exchange." If ALLTEL and SBC have entered into a separate agreement for transit traffic, the Staff believes that agreement must also be submitted to this Commission for approval under Section 251(a)(1).

8. SBC claims that a substantially similar interconnection agreement has been approved by the state commissions in eight separate states. However, SBC does not explain whether the transit traffic requirements in those states are the same as the requirements in Missouri. In Missouri, SBC bears no financial responsibility for transiting traffic. If SBC bears financial responsibility in whole or in part for transiting traffic in the other eight states, such differences could make transiting traffic particularly important in Missouri compared to other states. Furthermore, it is also possible that the other state Commissions were not aware of SBC's and Level 3's intention to agree on transit traffic terms and conditions in a separate agreement or their intention not to submit such agreement to the state commission for approval.

9. The Commission's ability to review transiting terms and conditions is the only means the commission has to ensure that transiting traffic does not discriminate against third parties who are not a part of the Agreement, a fundamental requirement of the Commission's duties and responsibilities under the Act. Accordingly, the Staff recommends that the Commission: 1) direct the parties to submit a complete transiting agreement in its entirety, including rates, to the commission for approval, or 2) include a statement in the instant agreement that transiting traffic will not be exchanged until an agreement governing such traffic is submitted to and approved by, the Commission. Under the second scenario, the parties would be in violation of Section 386.570 RSMo 2000 and could be separately penalized for each day that the parties operate under the transit traffic agreement without first receiving approval from this Commission.[4]

WHEREFORE, the Staff offers this response to SBC's and Level 3's responses to the Staff's Recommendation.

[4] Section 386.570 states "Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense."

Respectfully submitted,

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/s/ Marc Poston

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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 26th day of April 2005.

/s/ Marc Poston

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