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, L.P. d/b/a SBC Missouri for Approval of Their Negotiated Interconnection Agreement and Superseding Amendment under Section 252(3)(1) of the Telecommunications Act.	))))))	Case No. TK-2005-0285

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its order, the Commission voted to approve the comprehensive interconnection agreement ("ICA") submitted by Level 3 Communications, LLC ("Level 3") and Southwestern Bell Telephone Company, L.P. d/b/a SBC Missouri ("SBC Missouri") that was the result of extensive and lengthy negotiations between these companies. This is substantially the same agreement that apparently has been approved by at least eight other state commissions. I voted in favor of this order because I wholeheartedly agree with the Commission's conclusion that:

> "the interconnection agreement, as submitted, meets the requirements of the Act in that it does not discriminate against a non-party carrier and implementation of the agreement is not inconsistent with the public interest, convenience and necessity."

I am writing this concurrence, however, because I disagree with both the Commission's rationale and decision that requires Level 3 and SBC Missouri to file a transiting traffic commercial agreement for approval under § 252(3) if and when it is finalized – or provide the Commission with legal justification for not filing the agreement.

In the pleadings and responses submitted in this case, the parties have verified that they have reached an agreement in principle as to transit traffic that will be sent

over SBC Missouri's facilities.[1] This agreement, however, has not been reduced to writing and is not included in the ICA at issue in this order. Staff ardently argued that transiting traffic is a "vital form of indirect interconnection"; that allowing SBC Missouri and Level 3 to forego filing this separate commercial agreement would prejudice other carriers because they would not be able to adopt its terms; and that the entire ICA should be found to be discriminatory because the parties did not include transiting traffic terms. Staff also asserted in its Response to SBC Missouri's Response to Staff's Recommendations that because it has been an industry practice to include transiting traffic terms in ICAs, the Commission should find that it is a required element of any interconnection agreement until such time as the Federal Communications Commission ("FCC") issues some order or statement to the contrary. Nowhere in Staff's pleadings have they pointed to a specific provision of the 1996 Telecommunications Act ("the Act") or any of the FCC's rules thereunder that require the provisioning of transiting traffic services. The argument that "it's the way we've always done it" does not amount to legal precedent that requires the continuation of this practice.

Section 251(a) of the Act requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." This does not mean that every indirect transmittal of traffic is going to constitute an "interconnection". The duty to interconnect that is intended by this language is the duty to terminate traffic that is indirectly provided from another carrier upon request. In other words, the duty is to open up the terminating carrier's network to allow other carriers to connect with its subscribers. Acting as a third-party carrier between the originating carrier and the terminating carrier should not

[1] Transiting traffic is a service that allows Level 3 to deliver traffic originating on its network to SBC Missouri, who then sends the traffic to a third-party carrier where the call terminates.

trigger the duties of interconnection pursuant to § 251(a), as this does not require the third-party carrier to open its network for terminating traffic. The FCC has never held that anything in its rules or the Act requires the provision of transit services as a duty of interconnection under § 251. The duty of ILECs to provide interconnection, therefore, is limited to providing interconnection with the ILECs' networks for terminating traffic, not with the other carriers' networks as an intermediary.

Both staff and SBC Missouri have pointed out that in a recent proposed rulemaking the FCC noted that it "has not had occasion to determine whether carriers have a duty to provide transit service" under the Act and has asked for comment on this and other questions related to transit service.[2] At least one federal district court has reached the same conclusion.[3] Given the FCC's own questioning of the legal basis for requiring ILECs to provide transit service, this Commission did not need to reach the conclusion that an agreement to provide these services, negotiated under private commercial standards, needs to be filed with the Commission for approval or further litigated to determine the need for filing.

It is my opinion that by requiring this issue to remain under scrutiny with the possible outcome that it be filed with the Commission and thereafter available for adoption by all CLECs could have an adverse impact on SBC Missouri's, and for that matter any other ILECs' willingness to negotiate a private, commercial agreement for

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[2] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, released March 3, 2005, ¶ 120. While the FCC confirmed that "indirect interconnection" is "a form of interconnection explicitly recognized and supported by the Act" (¶ 125), the FCC has never found that incumbent carriers are required by law to provide transiting traffic service in order to facilitate such indirect interconnection.

[3] *See Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle, Robert B. Nelson and David Svanda, Commissioners of the Michigan Public Service Commission*, 222 F.Supp.2d 905, 917-918 (E.D. Mich. 2002), wherein the District Court found that the Michigan Public Service Commission had authority under state law to require transiting traffic services in an interconnection agreement because the FCC had not found this to be a requirement under the Act or its rules.

transiting traffic. This is true for any use of ILEC facilities that is not required under the Act or the FCC's rules. The provisioning of services and elements not otherwise required under the Act should be left to private negotiations between competitors that will reflect the needs of the marketplace and the individual requirements and characteristics of the parties subject to the negotiation.

There are provisions under § 211 of the Act for carriers to file contracts with the FCC that are not interconnection agreements subject to state review. SBC Missouri has asserted its intention to file any future transiting traffic agreements with the FCC pursuant to this provision. No other review is necessary.

True competition between ILECs and CLECs will never occur until regulators allow market influences to come to bear on these entities. The 1996 Telecommunications Act was never meant to allow CLECs to ride on the backs of the ILECs' networks for eternity; rather, it was meant to open the market to competitors by providing them with access until they could establish their own network facilities. As the last nine years have shown, the CLECs will not take all of the necessary steps to be independent of the ILECs until state and federal regulators stop imposing requirements where none are needed.

Respectfully submitted,

Connie Murray

Connie Murray, Commissioner

Dated at Jefferson City, Missouri
on this 6th day of May, 2005.