BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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(e)(1) of the Telecommunications Act	))))))	Case No. TK-2005-0285

RESPONSE OF SOUTHWESTERN BELL TELEPHONE, L.P. TO THE STAFF'S RECOMMENDATION

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") hereby submits to the Commission its Response to the Staff's Recommendation filed on April 11, 2005. As explained in more detail below, the Commission should reject Staff's Recommendation, and instead, move expeditiously to approve by May 24 the comprehensive interconnection agreement between Level 3 Communications, LLC ("Level 3") and SBC Missouri (hereinafter, "Agreement" or "Interconnection Agreement"). This Agreement was reached only after extensive and very time-intensive negotiations between Level 3 and SBC Missouri. The Agreement has already been approved by at least eight other state commissions to date, including the Arkansas, Kansas and Texas Commissions.

Staff's concerns here – even apart from being misplaced on the merits – are not ripe for decision because Level 3 and SBC Missouri have not reached any agreement regarding the particulars of transit traffic that SBC Missouri may accept from Level 3. When, and if, the transit traffic service agreement currently being negotiated by the parties becomes a definitive agreement, SBC Missouri is amenable to providing a copy to the Commission's Staff after it is filed with the Federal Communications Commission ("FCC").

Finally, the Commission should be aware that the FCC has expressly noted in its newly-opened Intercarrier Compensation Further Rulemaking proceeding that the FCC "has not had occasion to determine whether carriers have a duty to provide transit service" and has requested comment on this and related questions.[1] In light of the FCC's open proceeding, this Commission need not attempt to address these questions, especially given that SBC Missouri already makes a Transit Traffic Service Agreement available to all interested carriers. In any case, SBC Missouri disagrees with Staff's arguments, as they are not supported by any reasonable construction of the Telecommunications Act of 1996 ("the Act") or by any FCC precedent (which is, in fact, contrary to Staff's position).

In further support thereof, SBC Missouri states that:

1. This case was opened when Level 3 and SBC Missouri jointly submitted on February 23, 2005,[2] the comprehensive Interconnection Agreement they had reached only after many months of 13-state negotiations with SBC Missouri and its other ILEC affiliates. Both Level 3 and SBC Missouri requested that the Commission approve that Agreement.[3]

2. Concurrent with this activity, substantially the same Interconnection Agreement that Level 3 and SBC Missouri filed with this Commission (allowing for a few state-specific

[1] 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 ("Intercarrier Compensation FNPRM"). Moreover, Staff is incorrect that the FNPRM stands for the proposition that "transit service is a form of interconnection "explicitly recognized and supported by the Act." Staff's Recommendation, p. 4. Rather, The FCC confirmed that *indirect interconnection* is "a form of interconnection explicitly recognized and supported by the Act." Intercarrier Compensation FNPRM ¶ 125. The FCC has never held that ILECs are legally required to provide transit service in order to facilitate such indirect interconnection.

[2] More particularly, Level 3 and SBC Missouri jointly submitted for approval a negotiated interconnection agreement and superseding amendment to the interconnection agreement. For purposes of this pleading, the two will not be distinguished and will be referred to simply as the "Interconnection Agreement" or "Agreement."

[3] On February 24, 2005, the Commission issued an Order and Notice directing the Staff to file a memorandum advising either approval or rejection of the agreement. On April 19, 2005, the Commission issued its Order Granting Motion for Extension of Time to Respond to Staff's Recommendation, in which the Commission allowed SBC Missouri and Level 3 an additional four days, through April 22, 2005,in which to respond to Staff's Recommendation.

differences) was likewise filed with the state commissions in the other twelve of SBC's ILECs' operating states. To date, the Interconnection Agreement has been approved by the state commissions of Arkansas, California, Indiana, Kansas, Michigan, Nevada, Texas and Wisconsin. Approvals by the remaining state commissions are expected to follow in due course, the timing of which varies depending on the dates on which the Agreements were submitted to those commissions.

3. On April 11, 2005, almost two months after the Interconnection Agreement was submitted to this Commission, the Commission's Staff filed a recommendation ("Staff's Recommendation") in which the Staff urged that the Commission's approval process be halted because, as Staff put it, the Agreement "appears to lack a complete transit traffic provision." Staff's Recommendation, p. 2. More particularly, although the Staff voiced no concern regarding any portion of the voluminous agreement that had been submitted by the parties, Staff nonetheless recommended 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)." Staff's Recommendation, p. 6. This recommendation, and the reasons Staff offers in support of it, must be rejected for the reasons that follow.

4. As a threshold matter, however, it is important to note that Level 3 and SBC Missouri have not reached any agreement regarding the particulars of transit traffic that SBC Missouri may accept from Level 3. At present, coverage of the matter is limited to Section 38.1 of the General Terms and Conditions submitted to the Commission on February 23, 2005. As explained later in greater detail, this coverage is sufficient without more. In the meantime, negotiations on further terms and conditions relating to transit traffic continue between the

parties, and SBC Missouri cannot predict when (or if) they will reach fruition and thus bear a definitive agreement. Consequently, Staff's concern is not ripe and should not hinder the Commission's approval - by May 24 - of the Interconnection Agreement submitted by Level 3 and SBC Missouri.[4]

5. When and if an actual transit traffic agreement is struck between the parties, SBC Missouri anticipates that it will be filed with the FCC.[5] SBC Missouri is amenable to providing a copy of that FCC-filed document to the Commission. No further action need be taken because, while the FCC has noted that it "has not had occasion to determine whether carriers have a duty to provide transit service," it has requested comment on this and related questions.[6] Thus, SBC Missouri recommends that the Commission take no action to determine the merits of Staff's Recommendation given the FCC's open rulemaking proceeding.

6. The substance of the Staff's Recommendation is without merit. Staff indicates that it "is not convinced" by SBC Missouri's position that transit traffic provisions do not constitute interconnection with SBC. Staff's Recommendation, p. 3. However, Staff's Recommendation does not point to a single authority holding that ILECs are required to provide transiting under the Act. Moreover, nowhere does Staff provide an analysis of the pertinent provisions of the Act implicated in the FCC's Intercarrier Compensation rulemaking proceeding.

[4] The Commission has made clear that it intends to reach a final decision to either approve or reject the interconnection agreement submitted to it by May 24, 2005. Order Directing Response to Staff's Recommendation, issued April 12, 2005, p. 2.

[5] Section 211 of the Act provides for the filing with the FCC of certain contracts between carriers.

[6] 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 ("Intercarrier Compensation FNPRM"). Moreover, Staff is incorrect that the FNPRM stands for the proposition that "transit service is a form of interconnection "explicitly recognized and supported by the Act." Staff's Recommendation, p.4. Rather, The FCC confirmed that *indirect interconnection* is "a form of interconnection explicitly recognized and supported by the Act." Intercarrier Compensation FNPRM ¶ 125. The FCC has never held that ILECs are legally required to provide transit service in order to facilitate such indirect interconnection.

7. The FCC has never held that anything in its rules or the Act requires the provision of transit services. Section 251(a) requires all carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[7] However, there is a difference between a duty "to interconnect indirectly" and a duty "to provide indirect interconnection." The duty to interconnect indirectly requires a carrier to terminate traffic provided indirectly from another carrier (*i.e.*, through an intermediary third party acting on behalf of the other carrier) upon request. A duty to provide indirect interconnection, however, would require all carriers to act as the intermediary (*i.e.*, provide transit services) when two other carriers desire to interconnect with each other indirectly. The FCC has never determined that Section 251(a) of the Act imposes any such duty. In any event, the requirements imposed by Section 251(a) are not subject to mandatory negotiation or arbitration under the 1996 Act. Section 251(c)(1), which is the provision that specifies the duties that ILECs must negotiate (and which therefore are subject to arbitration under Section 252), requires negotiation only of the duties that Sections 251(b) and 251(c) impose on local exchange carriers, not the duties that Section 251(a) imposes on them.

8. The only duty to provide interconnection is set forth in 47 U.S.C. 251(c)(2), and that obligation is limited to interconnection of the requesting carrier "with the [incumbent] local exchange carrier's network." The duty of ILECs to provide interconnection, therefore, is limited to providing interconnection with the ILECs' networks, not with other carriers' networks. The FCC has never held that this or any other provision of the Act imposes a duty upon ILECs to provide or facilitate indirect interconnection and transit services between two other carriers.

[7] Level 3's witness William P. Hunt III admitted as much in the underlying arbitration case, stating that "[t]here is no FCC rule that requires SBC to transit traffic under Sections 251 and 252." Case No. TO-2005-0166, Direct Testimony of William P. Hunt III, p. 46 (pre-filed December 14, 2004).

9. This interpretation is consistent with the decision of the FCC's Wireline Competition Bureau ("Bureau") in the Verizon/AT&T/WorldCom/Cox arbitration for Virginia ("FCC Virginia Arbitration Order").[8] In that proceeding, Verizon argued that, while every carrier has a right to interconnect indirectly with any other carrier under 47 U.S.C. § 251(a), there is nothing in the Act that permits carriers to transform that right into a duty on the part of ILECs to provide transit services and thus facilitate the duty of other carriers to interconnect indirectly.[9]

10. The Bureau noted that the FCC has not had occasion "to determine whether incumbent LECs have a duty to provide transit service under [47 U.S.C. § 251(c)(2)]."[10] Nor did the Bureau find "clear Commission precedent or rules declaring such a duty."[11] The Bureau also did not specifically determine whether ILECs have a duty under 47 U.S.C. § 251(a) to provide transit services. Rather, the Bureau concluded that "any duty Verizon may have under section 47 U.S.C. § 251(a) of the Act to provide transit service would not require that service to be priced at TELRIC."[12] Thus, the Bureau has confirmed that no FCC rule requires carriers to provide transit services, and even if carriers are obligated to do so, they are permitted to charge market rates for those services.

11. In short, the FCC has never held that any provision of the Act requires ILECs to provide transit services. Nor is there any FCC rule requiring ILECs to provide transit services. Unless and until the FCC concludes otherwise, the Commission should not take a stance at odds

[8] Memorandum Opinion and Order, Petitions of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration, et. al., CC Docket Nos. 00-218, 00-249, 00-251, DA 02-1731 (released July 17, 2002).
[9] FCC Virginia Arbitration Order, ¶ 113.
[10] FCC Virginia Arbitration Order, ¶ 117.
[11] FCC Virginia Arbitration Order, ¶ 117.
[12] FCC Virginia Arbitration Order, ¶ 117.

with that taken by the FCC's own Wireline Competition Bureau in the FCC Virginia Arbitration Order by refusing to approve the Interconnection Agreement submitted to it by Level 3 and SBC Missouri absent a transit traffic agreement that has not been reached between the parties. Stated another way, it would not be appropriate for the Commission to rule here that SBC Missouri has a duty under federal law when the FCC's own delegated bureau declined to do so in a litigated arbitration.

12. Staff is perplexed that the current interconnection agreement between Level 3 and SBC Missouri, approved on November 21, 2001 in Case No. TO-2001-179, contains transit traffic terms and conditions that are not provided for in the successor Interconnection Agreement. Staff's Recommendation, p. 2. Staffs wonders about "what has changed to remove transit traffic provisions from interconnection agreements reviewed by this Commission." Staff's Recommendation, p. 3. But Staff's question is addressed by three intervening developments since 2001. Certainly, one such intervening development is the FCC Virginia Arbitration Order (July, 2002), which postdated the Commission's approval of the current Level 3 agreement by approximately nine months. However, that decision is not referenced by the Staff's Recommendation. A second development is the recent emergence of commercial agreements – recognized and explicitly encouraged by the FCC in its February, 2005, UNE Remand Order - in light of changing law.[13] This development is likewise omitted in the Staff's Recommendation.

[13] E.g., 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, Order on Remand released February 4, 2005, ¶ 145 (regarding the dedicated transport transition period, "[t]he transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of transport facilities or services"); ¶ 198 (regarding the unbundled high-capacity loops transition period, "[t]he transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of high-capacity loop facilities or services"); ¶ 228 (regarding the unbundled access to local circuit switching transition period, "[t]he transition mechanism adopted today also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of UNE-P or for a transition to UNE-L").

13. A third item overlooked by Staff is that only months ago it recommended that the Commission approve, in Case No. TK-2005-0114, a Cellular/PCS interconnection agreement between ALLTEL and SBC Missouri -- even though that agreement (as does the Level 3/SBC Missouri Interconnection Agreement) provides no rates, terms or conditions associated with transit traffic, but nonetheless clearly contemplates the passage of such traffic.[14] The Staff's December 16, 2005 Recommendation in that case (at p. 1) concluded "that the Interconnection Agreement does not discriminate against telecommunications carriers not a party to the Agreement, and the Agreement is not against the public interest, convenience or necessity." The Commission approved the agreement five days later, similarly concluding that "the Agreement meets the requirements of the Act."[15] The Interconnection Agreement submitted to the Commission by Level 3 and SBC Missouri on February 23, 2005 specifically provides that SBC Missouri will provide Level 3 transit service and that Level 3 will use reasonable efforts to enter into agreements with third party carriers that exchange traffic with Level 3. General Terms and Conditions, Section 38.1. While the specific rates, terms and conditions of such service are not presented in the agreement, neither were they presented in the Commission-approved ALLTEL agreement.[16] The Level 3/SBC Missouri Interconnection Agreement should be approved as is, as was the ALLTEL/SBC Missouri interconnection.

14. Not only do these developments address Staff's question as to what has changed since 2001, they also belie Staff's broad claim that "an interconnection agreement is

[14] Section 30.1 of the General Terms and Conditions provides that "ALLTEL will not send to SBC-13STATE local traffic that is destined for the network of a Third Party unless ALLTEL has the authority to exchange traffic with that Third Party." The matter of "Transit Traffic," although referenced within the table of contents to the Interconnection Trunking Requirements Appendix, does not appear within the body of that appendix.
[15] In the Matter of the Application of ALLTEL Communications, Inc., for Approval of its Successor Cellular/PCS Interconnection Agreement and Accompanying Amendment with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, under 47 U.S.C. Section 252, case No. TK-2005-0114, Order Approving Interconnection Agreement, p. 2.
[16] See, note 13, *infra.*

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." Staff's Recommendation, p. 5.

15. Furthermore, Staff concedes, as Section 252(e)(2)(A) expressly provides, that a state commission may reject an interconnection agreement only if the agreement "discriminates against a telecommunications carrier not a party to the agreement" or if the agreement "is not consistent with the public interest, convenience and necessity." Staff's Recommendation, p. 5. But the Staff's Recommendation raises no issues with the Interconnection Agreement that Level 3 and SBC Missouri have already submitted to this Commission for approval, and as to that Agreement, the law plainly requires that it be made available by SBC Missouri "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." Section 252(i).

16. Staff's related, if not principal concern, is that "[i]f 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)." Staff's Recommendation, p. 5. However, Staff's discrimination-related concern is again misplaced because, while it is SBC Missouri's position that a transit agreement would not be subject to Section 252(i), Staff's concern is also refuted by the facts.

17. First, SBC Missouri's prior testimony regarding the transit matter addressed – and put to bed – any potential claim of discrimination from other carriers that might want to negotiate a transit agreement with SBC Missouri. As SBC Missouri witness Scott McPhee stated in pre-filed direct testimony filed in the underlying arbitration case, "SBC Missouri will continue to

offer a transit service for carriers that would prefer to use SBC Missouri's network to reach third party carriers."[17] He made the point even more plain in pre-filed rebuttal testimony filed in that case when, in explaining that "the terms of SBC Missouri's transit service are contained in a separate commercial agreement," he stated unequivocally that "SBC Missouri has made this Transit Traffic Service Agreement available for all carriers interested in having SBC Missouri transit traffic for them."[18] (emphasis added). Additionally, SBC Missouri files consummated Transit Traffic Service Agreements with the FCC. For these reasons alone, Staff's apparent discrimination concern is without any factual basis.

18. Second, no local exchange carrier has even suggested, much less proven, that it is or could be the victim of discrimination relative to SBC Missouri's transit service. That may well be because, as demonstrated above, SBC Missouri has made its Transit Traffic Service Agreement available to all carriers, and publicly files them with the FCC. Indeed, the Transit Traffic Service Agreements consummated with each of ALLTEL and with Chariton Valley Communications Corporation, Inc. are prime examples. (The latter is attached to SBC Missouri's Response today to Staff's Recommendation in Case No. TK-2005-0300). In any case, were Staff's claim possessed of any factual basis supporting it, one would have expected that several carriers would have sought to intervene in this case. However, not a single carrier chose to do so. Under this circumstance, there is no factual basis to conclude that any carrier "may be adversely affected by a final order" approving the Interconnection Agreement or that any such final order might not "serve the public interest." 4 CSR 240-2.075(4)(A),(B).

19. For all of the foregoing reasons, SBC Missouri respectfully submits that the Commission should reject Staff's Recommendation. Because the concerns raised by Staff are

[17] Case No. TO-2005-0166, Direct Testimony of J. Scott McPhee, p. 20 (pre-filed January 24, 2005).
[18] Case No. TO-2005-0166, Rebuttal Testimony of J. Scott McPhee, pp. 5-6 (pre-filed February 7, 2005).

neither ripe nor substantively valid, SBC Missouri urges the Commission to move expeditiously to approve the detailed and comprehensive Interconnection Agreement as that agreement was filed on February 23, 2005. This Agreement is the culmination of several months of hard work by Level 3 and SBC Missouri and has already been approved by at least eight other state commissions. Should the transit traffic service agreement currently being negotiated by the parties become a final agreement, SBC Missouri is amenable to providing a copy to the Commission's Staff after it is filed with the FCC. Finally, SBC Missouri urges that the Commission take no action to determine the merits of Staff's Recommendation, given the legal and factual considerations presented above, and the FCC's open Intercarrier Compensation Further Rulemaking proceeding.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been electronically mailed to all counsel of record this 22nd day of April, 2005.

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