

KENNETH C. HOOGEBOOM

Attorney at Law
5181 Plainfield, N.E.; Suite A
Grand Rapids, MI 49525

(616) 361-6722 -- 361-1234 (Fax)
khoogeboom@triton.net

FILED

JUN 12 2006

MICHIGAN PUBLIC
SERVICE COMMISSION

June 8, 2006

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
PO Box 30221
Lansing, MI 48909

Re: In the matter of the complaint of **LUCRE, INC.**, against
MICHIGAN BELL TELEPHONE COMPANY, d/b/a SBC,
To resolve a dispute over payment of reciprocal compensation.
MPSC Case No. U-14374

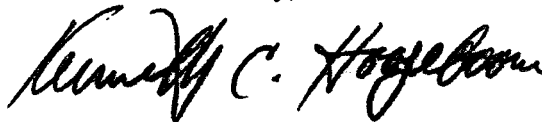
In the matter of the complaint of and application for resolution of **SBC**
MICHIGAN against **LUCRE, INC.** for refusals to pay certain charges lawfully
assessed and for other violations of duties under law.
MPSC Case No. U-14384

Dear Ms. Kunkle:

Enclosed for filing please find an original and four copies of Lucre, Inc.'s Supplement to Motion for Rehearing, Brief in Support of Motion for Rehearing, and Affidavit of Jon K. Hale in the above-captioned case. A Proof of Service upon the Parties of Record is also enclosed. These documents have been filed electronically with the Michigan Public Service Commission's Electronic Case Filing System.

Thank you for your cooperation.

Yours truly,



Kenneth C. Hoogeboom

KCH/bd

Enclosures

cc: Parties of Record (w/encs.)

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of **LUCRE, INC.**,)
against **MICHIGAN BELL TELEPHONE**)
COMPANY, d/b/a SBC, to resolve a dispute over)
payment of reciprocal compensation.)
_____)

Case No. U-14374

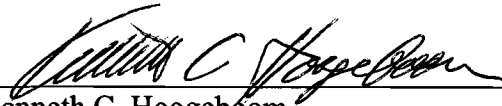
In the matter of the complaint of and application for)
resolution of **SBC MICHIGAN** against **LUCRE**,)
INC., for refusal to pay certain charges lawfully)
assessed and for other violations of duties under law)
_____)

Case No. U-14384

PROOF OF SERVICE

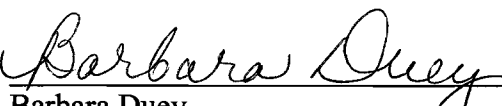
STATE OF MICHIGAN)
 (ss.
COUNTY OF KENT)

Kenneth C. Hooceboom, being duly sworn, deposes and says that on June 8, 2006, a copy of **Lucre's Supplement to Motion for Rehearing, Brief in Support of Motion for Rehearing, Affidavit of Jon K. Hale, along with Proof of Service**, in the above-captioned, was served via Electronic Mail and United States Postal Service First Class Mail upon those parties listed on the attached service list.



Kenneth C. Hooceboom

Subscribed and sworn to before me this 8th day of June, 2006.



Barbara Duey
Notary Public, Newaygo County, Michigan
Acting in Kent County, Michigan
My Commission Expires: 9/17/2006

SERVICE LIST

MPSC Case No. U-14374

MPSC Case No. U-14384

Page 1 of 1

SBC MICHIGAN

Ms. Lisa M. Bruno
Senior Counsel
SBC MICHIGAN
444 Michigan Avenue, Room 1750
Detroit, MI 48226

E-Mail: lb2872@sbc.com

Mr. John Dempsey
DICKINSON WRIGHT PLLC
215 South Washington Street, Suite 200
Lansing, MI 48933

E-Mail: jdempsey@dickinson-wright.com

MICHIGAN PUBLIC SERVICE COMMISSION

Mr. Orjiakor N. Isiogu
Director, Telecommunications Division
MICHIGAN PUBLIC SERVICE COMMISSION
6545 Mercantile Way, Suite 15
Lansing, MI 48911

E-Mail: onisiog@michigan.gov

Mr. David A. Voges
Ms. Angie L. Fadly
Assistant Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911

E-Mail: vogesd@michigan.gov
fadlya@michigan.gov

STATE OF MICHIGAN

FILED

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

JUN 12 2006

MICHIGAN PUBLIC
SERVICE COMMISSION

In the matter of the complaint of LUCRE, INC. ,)
against MICHIGAN BELL TELEPHONE)
COMPANY, d/b/a SBC, to resolve a dispute over)
payment of reciprocal compensation.)
_____)

Case No. U-14374

In the matter of the complaint of and application for)
resolution of SBC MICHIGAN against LUCRE,)
INC., for refusal to pay certain charges lawfully)
assessed and for other violations of duties under law)
_____)

Case No. U-14384

SUPPLEMENT TO
MOTION FOR REHEARING

NOW COMES LUCRE, INC. ("Lucre"), by its attorneys of record, and hereby supplements its Motion for Rehearing, previously filed on August 11, 2005. This supplement consists of two additional points, which are set forth below as issues (4) and (5). [The original points are repeated below as issues (1)-(3).]

Lucre, pursuant to R 460. 17403 ("Rule 403"), previously moved the Commission for rehearing of its Order, dated August 1, 2005, with respect to the following errors of law:

- (1) Holding Lucre financially responsible for direct trunking to a third party pursuant to subsection 4.4.2 of the parties' Interconnection Agreement;
- 2) Allowing SBC to avoid its transiting responsibility by reliance on subsection 7.3.4 of the parties' Interconnection Agreement;

(3) Ordering that Lucre provide proof of payment to a privately retained mediator.

Lucre now supplements the foregoing errors of law with further claims under Rule 403 for unintended consequences and newly discovered evidence:

(4) The Commission's Order has (a) the unintended consequence of allowing an SBC to dictate interconnection for Lucre to a third-party ILEC; and (b) the further unintended consequence of completely terminating the transiting responsibility of SBC.

(5) The Commission's Order did not have the benefit of newly discovered evidence, to wit: two sections of the trunking at issue connected the third party's (Verizon's) end offices to Verizon's switch, for which Lucre has been billed over \$580,000 by SBC.

WHEREFORE, Lucre requests that the Commission rehear these issues, the reasons in support of which are more fully set forth in its Revised Brief in Support of Motion for Rehearing enclosed herewith.

Respectfully submitted,

Date: June 8, 2006.


Kenneth C. Hoozeboom (P27416)
Attorney for Lucre, Inc.
5181 Plainfield, N.E.; Suite A
Grand Rapids, MI 49525
(616) 361-6722; 361-1234 (Fax)
khoozeboom@triton.net

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **LUCRE, INC.**,)
against **MICHIGAN BELL TELEPHONE**)
COMPANY, d/b/a SBC, to resolve a dispute over)
payment of reciprocal compensation.)
_____)

Case No. U-14374

In the matter of the complaint of and application for)
resolution of **SBC MICHIGAN** against **LUCRE**,)
INC., for refusal to pay certain charges lawfully)
assessed and for other violations of duties under law)
_____)

Case No. U-14384

BRIEF IN SUPPORT OF
MOTION FOR REHEARING

The Commission provided two reasons for finding Lucre liable for direct trunking, each of them based on a subsection of the ICA. See Order, dated August 1, 2005, at page 16. These subsections will be taken up in Arguments 1 and 2, below, on the grounds that each of the Commission's interpretations constituted an error of law, which Rule 403(1) allows as a basis of rehearing.

The Commission's Order also required Lucre to present proof of payment of a disputed mediation bill from a privately retained mediator without the authority to do so and without the benefit of notice and hearing. This issue will be taken up in Argument 3, below, as an error of law under Rule 403(1).

The Commission's Order carried several unintended consequences. First, it allows an ILEC to dictate interconnection for a CLEC to a third-party ILEC. Second, it prematurely and completely terminates the transiting responsibility of an ILEC. These issues will be taken up in Argument 4, (a) and (b), below, as unintended consequences under Rule 403(1).

Finally, the Order did not have the benefit of newly discovered evidence. Two sections of the trunking at issue connected Verizon's End Offices to Verizon's Switch. This issue of billing Lucre for over \$580,000 will be taken up in Argument 5, below, as newly discovered evidence under Rule 403(1).

1. Lucre cannot be held financially responsible for direct trunking to a third party pursuant to subsection 4.4.2 of the ICA.

Article IV of the ICA contains a scope provision which limits the article's application to trunking between the customers of SBC and Lucre. Section 4.1 reads:

4.1 Scope of Traffic

Article IV prescribes parameters for trunk groups (the "Local/IntraLATA Trunks") to be effected over the Interconnections specified in Article III for the transmission and routing of Local Traffic and IntraLATA Toll Traffic between the Parties' respective Telephone Exchange Service Customers. (Emphasis added.)

In light of this restrictive language, it is impossible to extend the trunking obligation of subsection 4.4.2 to include the establishment of trunking between Lucre and a third party (in this case, Verizon), even in the instance of overloaded circuits. Prior to the ALJ's Proposal for Decision, Lucre cited this scope provision (Lucre's Reply Brief at pages 2-3); apparently the ALJ realized the effect of this language and thus did not rely on any subsection 4.4.2 obligation arising out of tandem exhaust to make Lucre liable for direct trunking. The Commission should follow suit.

2. SBC cannot avoid its transiting obligation by reliance on subsection 7.3.4 of the ICA.

The Commission also relied on an ICA transiting provision, found in subsection 7.3.4, to allow SBC to escape its transiting obligation, thereby forcing Lucre to pay for direct trunking in lieu of SBC's transiting third party calls. This subsection obligates SBC to "provide Lucre with Transit Service" for a period of time, namely,

until the earlier of the date on which either Party has entered into an arrangement with [a] third party LEC ... to deliver ... Traffic to Lucre.... (Emphasis added)

The Commission used this subsection to reason that the Verizon-Lucre ICA ("permanent arrangement with Verizon in 2001") qualifies as the "arrangement" which eliminates SBC's transiting duty. Order at page 16.

But this issue cannot be concluded with a simple reference to another ICA. First, the mere signing of an agreement will not suffice, for subsection 7.3.4 does not say "agreement with a third party," it says "arrangement with a third party ... to deliver," obviously meaning the actual installation of direct trunking.

Second, SBC breached its transiting duty by refusing to augment its tandem when requested by Lucre to do so, and thereby forced Lucre to order DEOTS. There was nothing

voluntary at all about Lucre's making that arrangement because SBC left it no choice other than disruption of service.

Indeed, SBC's refusal to augment its tandem in order to eliminate dropped calls was a clear violation of the non-discriminatory provision found in 47 U.S.C. 251(c)(2)(C) (Section 251(c)(2)(C) of the Telecommunications Act of 1996). This governing provision requires an ILEC to furnish interconnection "at least equal in quality to that provided to itself or to any ... other party". Surely SBC would never tolerate interruption of service to its customers. As a result, SBC not only breached its transiting duty, it also violated the law.

SBC's refusal to augment its tandem was also a violation of its ICA with Lucre. Section XIX.18 thereof makes SBC and Lucre responsible for securing adequate trunking, which would obviously include a large enough tandem to meet its transiting obligations.

Each Party is responsible for obtaining transport facilities sufficient to handle traffic between its network and the other Party's network....

In any event, SBC's breach of its transiting duty preceded any arrangement between Lucre and Verizon. Nevertheless, the Commission would have SBC save money (by not augmenting its tandem) and then profit from its breach (by requiring and billing for direct trunking). This is not the way the parties intended their ICA to function. The ICA certainly envisioned the two ILECS making the arrangement in question at that point¹ in time when SBC's transiting charges to Verizon became substantial enough to warrant Verizon's ordering of DEOTS. Instead, SBC joined with Verizon to make an unsuspecting Lucre order direct trunking. Lucre did not see this unholy alliance coming, but with the benefit of hindsight, the Commission should have spotted it.

In conclusion, Lucre cannot be responsible for the access trunks because it ordered them only as a last resort to continue service when SBC breached its contract to provide transiting. This cost, if cost it be, was incurred as a result of SBC's breach, and therefore, should be forgiven as a consequence of SBC's conduct. SBC should not be allowed to benefit from its own wrong.

3. The Commission (a) has no authority to order the payment of a privately retained mediator's bill; and (b) has not complied with due process of law.

(a) The Commission's Order required Lucre to submit payment of the mediator's bill within 10 days. Neither Section 203a of the Michigan Telecommunications Act, MCL 484.2203a, nor the Commission's Rules provides any authority for such an order. The sole references to mediation are those in subsections 203a (2) and (3), which give the Commission the power to order mediation (but only in the case where the parties do not agree to an alternative matter, which was done in this case in the form of a private agreement with a third party mediator to which the Commission was not a party) and to adopt a recommended settlement as

¹ See Lucre's Exceptions to PFD at pages 9-11 and Lucre's Reply Brief at pages 4-6.

its order. Nowhere do these provisions mention any authority to collect a bill of a private, non-party.

The Commission is a creature of statute and, as such, its authority should be strictly construed not to exceed the precise extent granted by the legislature. See *Consumers Power Co v PSC*, 189 Mich App 151, 176 (1991) (“strictly construed”/“doubtful power does not exist”); *Union Carbide v PSC*, 431 Mich 135, 146-148 (1988) (“created by statute”/“grant of specific authority or powers” required). Thus, subsections 203a (2) and (3) cannot be read expansively so as to furnish authority to award a non-party compensation for services rendered.

(b) Even assuming that the Commission did have the authority to collect a non-party’s bill, its attempt to do so here is invalid. Its Order was not based on notice and hearing, which are fundamental requirements of due process of law. See *Convalescent Center v Blue Cross*, 414 Mich 247, 261, 272 (1982) (“notice and the opportunity to be heard”/“an opportunity to explain its position and rebut adverse evidence”); *Renny v Port Huron Hospital*, 427 Mich 415, 436-438 (1986) (contains a list of “the essential elements necessary to fair adjudication in administrative and arbitration proceedings,” including notice, hearing and the “fair opportunity to rebut evidence and argument by the opposing argument”).

These components of “elementary fairness,” *id.*, were not present for this issue and thus any order lacking a foundation on them cannot stand. No party brought a petition or motion to the Commission. The mediator did not bring a petition or motion to the Commission. No hearing was provided on objections to the mediator’s invoice, nor was any step allowing for formal objections to the invoice ever taken. The summary order issued by the Commission was therefore an error of law. No party should have a money judgment ordered against it without a fair hearing. Consequently, the Commission should vacate that part of its order on that basis.

4 (a). The Commission should avoid the unintended consequence of allowing an ILEC to force interconnection for a CLEC to a third-party ILEC by reconsidering its expansive interpretation of ICA Section 4.4.2.

On page 16 of its Order the Commission interpreted 4.4.2 by requiring Lucre to order trunking from any third party ILEC when certain criteria are met:

... if traffic volumes exceeded the limit set in section 4.4.2, then trunks would have to be installed prior to the date of any arrangement being made with the third party LEC.

This interpretation introduces a new concept in telecommunications relationships, namely, that Lucre must get into a trunking arrangement/traffic exchange from Verizon prior to negotiating an Interconnection Agreement with them. The Telecom Act of 1996 prescribes interconnection with ILECs for the purpose of exchanging telecom traffic. Nowhere does it provide for trunking hookups from a CLEC without an Interconnection Agreement. The

SBC/Lucre ICA does not call for it, either. It is only when the Commission erroneously extended 4.4.2 to include third party LECs could such a condition be concocted.

When correctly applied to SBC and Lucre, as the contracting parties (see discussion or the "scope" provision in 4.1 of the ICA, above), 4.4.2 is nothing more than a common-sense housekeeping provision to control the volume of their own originated traffic on the tandem. Its directive simply is--install direct trunks from your Central Offices to the other party when traffic volume warrants it. So clear and simple is the goal that there is not even a mention of cost responsibility. The commission clearly erred. The section does not address third party traffic, and therefore is not intended to impose third party interconnection expenses upon either of the parties.

The idea that customer call volumes originating from third party ILECs can force a CLEC to install trunks from (or interconnect with) that ILEC is contrary to this Commission's own ruling--which places that decision in the hands of the CLEC when their traffic warrants such. The Commission's Order in U-13931, Telnet/Verizon Arbitration, at page 23, states:.

The Commission further finds that its decision is consistent with public policy insofar as it encourages CLECs like TelNet to directly interconnect with the incumbents when the traffic warrants it, rather than utilizing the less efficient method of paying for transit across a third party's network. A CLEC may safely make this determination without concern that it will thereby be required to build and provide free facilities to transport to its network traffic originating on the incumbent's network. (Emphasis added).

It is apparent that the Commission appreciated the economics of transiting, and how decisions regarding transiting are influenced by the marketplace. In addition, there seems to be no question that other LECs pay transiting fees to SBC to deliver their traffic. It is puzzling then, that the MPSC believed that there is some mechanism in 4.4.2 that ignores those principles.

The Commission's insistence on a direct connection to a third-party ILEC, in advance of an Interconnection Agreement, also ignores federal precedent. The "private negotiation" culminating in an ICA "is the centerpiece of the [Telecommunications] Act". *Verizon North, Inc. v. Strand* 309 F.3d 935, 940 (6th Cir. 2002). Thus, any process which circumvents an interconnection agreement violates the Act and must be set aside as "preempted." *Id.* At 941. It follows that the Commission's use of Section 4.4.2 is invalid because it requires a carrier to strike some kind of direct transport arrangement prior to negotiating and signing of an ICA.

The unintended consequence of the Commission's interpretation is that it will force large and unnecessary expenditures upon CLECs and other ILECs. The Commission's interpretation grants SBC the power to force CLECs to interconnect with other ILECs. Interconnections "by demand" provide no value to the CLEC as they may overlap in territories

already served by the CLEC. Neither is there any value for the ILECs. To the contrary, there will be unnecessary expense to all.

4 (b). The Commission should also avoid the unintended consequence of terminating the balance of a transiting responsibility of an ILEC by reconsidering its expansive interpretation of ICA Section 4.4.2, as well as its interpretation of 7.3.4.

Another unintended consequence of the Commission's interpretations of 4.4.2 and 7.3.4 is the premature termination of SBC's transiting duty. On page 16 of its Order the Commission rendered its interpretation authorizing an end to SBC's transiting duty.

... until Lucre has made permanent arrangements with third party LECs, the interim arrangement will involve SBC providing Lucre with transit service. Lucre entered into such a permanent arrangement with Verizon in 2001, and SBC's temporary transit obligation ended at that point.

This ruling creates problems. First, although Section 4.4.2 deals with a progression to direct trunking at the Central Office level--on an office-by-office basis--that office-by-office scope cannot be reconciled with the Commission's conclusion that SBC's transiting obligation ends in entirety for that ILEC once direct trunking occurs at the first Central Office which reaches a threshold. The end of transiting deprives the "below-threshold," "non-trunked" Central Offices of a route for call delivery.

Second, this ruling also undermines Section 7.3.4. Based on the Commission's logic, the "permanent arrangement" under 7.3.4 might be trunks to a single central office, or a signed Interconnection Agreement. However, neither arrangement assures continuity of transiting. As argued earlier (see 2 above), 7.3.4 requires an "arrangement to deliver."

If the interpretations in the MPSC Order are valid, SBC is erroneously authorized to stop transiting when either (a) trunking is installed to a single office, or (b) a new ICA is signed. When SBC chooses to exercise such authority, callers from Centurytel, Allendale, Carr, and many others LECs will not be delivered. This condition will no doubt interfere with telephone traffic in Michigan.

5. Newly discovered evidence reveals that Lucre should not have been charged at all for two sections of the trunking at issue because those sections connected Verizon end offices to Verizon's switch.

In the course of recent discussions with Verizon earlier this year, Lucre was startled to learn that almost half of what SBC had invoiced Lucre for was comprised of circuits from Verizon end offices in Bellaire and Howard City to Verizon's Muskegon switch. See the attached affidavit of Jon K. Hale. This discovery made it obvious that Lucre had been ordered to pay for trunking that was part of Verizon's interior network and never directly connected Lucre

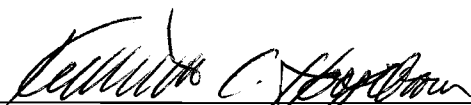
with Verizon. See attached diagram, indicating that those trunks are entirely within Verizon's network.

This clearly shows that SBC billed the wrong party. It should have billed Verizon because Verizon, not Lucre, should be responsible for the build-out of its own network. Verizon's responsibility for this build-out should be all the more certain because it was Verizon-originated traffic that necessitated the build-out in the first place.

It is no answer to say that Lucre was the party that submitted the orders. The fortuity of who placed the order should not fix financial responsibility, particularly in light of the fact that it was, once again, Verizon traffic which led to the orders. Lucre was simply seeking to alleviate a problem caused by Verizon's customers; the ordering process it used to do so (ASRs) gave no indication of whether it would be charged for the order. See testimony of Bruce W. Gerber, Sr., tr. 303 and 308, answers Q. and A., 6 and 21.

Respectfully submitted,

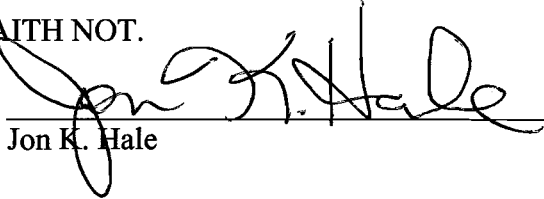
Date: June 8, 2006.


Kenneth C. Hoogeboom (P27416)
Attorney for Lucre, Inc.
5181 Plainfield, N.E.; Suite A
Grand Rapids, MI 49525
(616) 361-6722; 361-1234 (Fax)
khoogeboom@triton.net

AFFIDAVIT OF JON K. HALE

JON K. HALE, being first duly sworn, deposes and says as follows:

1. He is the CFO of Lucre, Inc.
2. In January of this year, he was attempting to reconcile certain charges with Verizon when he discovered that the trunking from Bellaire and Howard City traveled from one Verizon switch to another without ever touching Lucre's network and, as such, this trunking was entirely within Verizon's and SBC's networks. (These trunks are depicted in **Exhibit 1** attached hereto.)
3. He made this discovery because the air mile calculations used in both the SBC and Verizon billings for these facilities did not correspond to the actual air mileage calculations per the National Exchange Carrier Association's Tariff F.C.C. No. 4. While both the Verizon and the SBC billings indicated that the facilities ran directly from the Verizon end offices, based on the air mileage calculations, Lucre was able to determine that in both cases (Bellaire and Howard City) the facilities actually run from the Verizon end office to the Verizon tandem in Muskegon.
4. This information would not have been discovered as part of the SBC filed complaint because that complaint was only dealing with the SBC billings for these facilities. Also, as part of the documentation SBC provided, the details of the Bellaire and Howard City facilities were conveniently omitted. See **Exhibit 2**, which is a copy of the Exchange Area Boundary diagram provided by SBC's witness (M. Novack) in this matter, Case No. U-14384.
5. The amount that the Commission has ordered Lucre to pay SBC for these circuits in Verizon's network is \$588,614.40. This amount is supported by **Exhibit 3**, which is a breakdown of the SBC facility charges that relate to the Verizon circuits included in this case.
6. He is competent to testify as to the matters stated herein, and if called upon to do so, he would so testify.
7. FURTHER YOUR AFFIANT SAITH NOT.


Jon K. Hale

Subscribed and sworn to before me this 8th day of June, 2006.

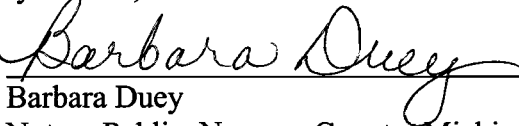

Barbara Duey
Notary Public, Newaygo County, Michigan
Acting in Kent County, Michigan
My commission expires: 9/17/2006

EXHIBIT 1

Dedicated Trunk Routes Western Michigan (LATA 348)

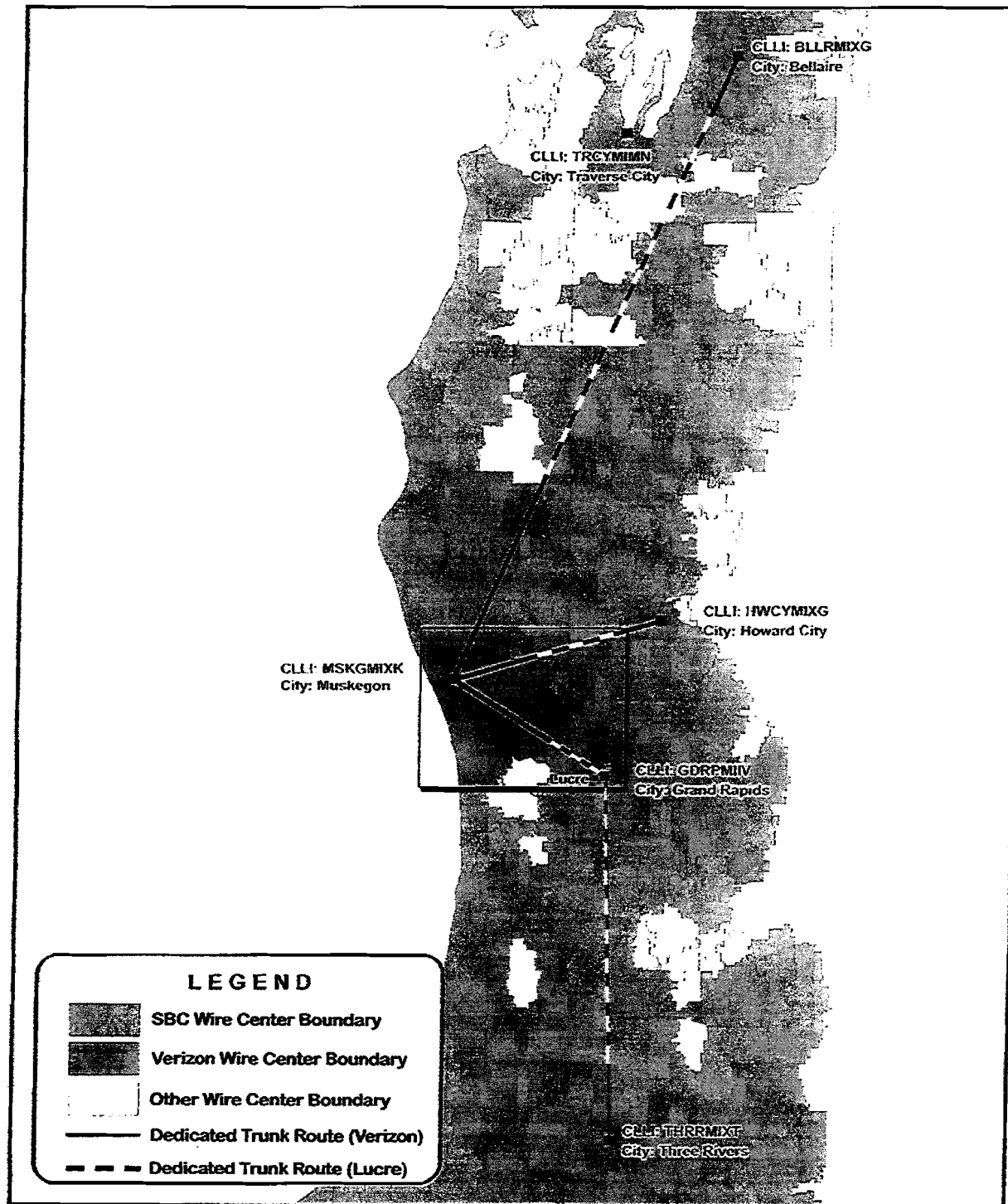
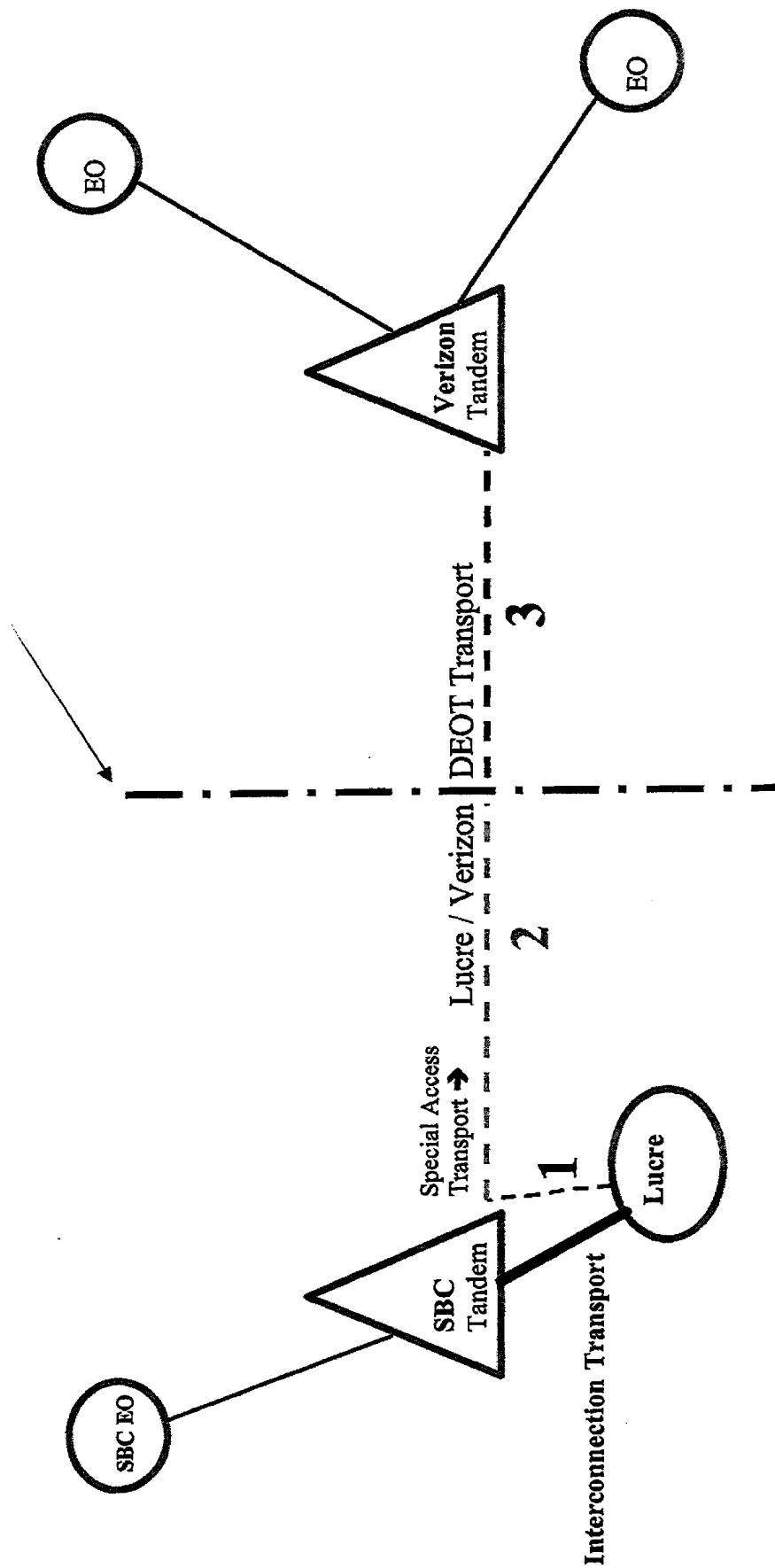


EXHIBIT 2

SBC Michigan / Verizon
Exchange Access Boundary (EAB)



- 1) Lucre to Verizon Direct End Office Trunk ("DEOT"). Uses a portion of the Interconnection Transport between Lucre and SBC Tandem premise. No switching takes place at SBC Tandem Premise.
- 2) Subject of SBC Complaint: Portion of DEOT (Special Access) Transport, within SBC's operating franchise territory, that Lucre purchased from SBC to reach the EAB in order to complete the DEOT to Verizon's switch..
- 3) Portion of DEOT within Verizon's operating franchise territory.

EXHIBIT 3

SBC FACILITIES CHARGES

<u>Type</u>	<u>Location</u>	<u>313 S67-340</u>	<u>313 S67-4281</u>	<u>313 K60-3601</u>	<u>TOTAL</u>
VERIZON FACILITIES					
	Howard City (DS1 - 4)	107,086.08			107,086.08
	Bellaire (©S7 - 4)	,528.32			481,528.32
	Muskegon (053)	13,869.60	25,203.82		39,073.42
	Three Rivers (©S3 - 2)	116,458.40	83,799.76		200,258.16
	Other Charges	174,119.00	2,544.58		176,663.58
	Taxes	80,375.57	10,048.33		90,423.90
	VERIZON TOTAL	973,437.47	121,696.49	0.00	1,095,133.96

NOTE: The Howard City and Bellaire charges listed above; \$107,086.08 and \$481,528.32 respectively, total \$588,614.40 noted in the Affidavit.