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Missouri Public  
Service Commission

**FILED**

APR 06 2001

Missouri Public  
Service Commission

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
200 Madison Street, Suite 100  
P.O. Box 360  
Jefferson City, Missouri 65102

Re: Case No. TO-2000-667  
Southwestern Bell Telephone Company Local Plus® Service

Dear Mr. Roberts:

Please find enclosed for filing in the above-referenced case an original and eight (8) copies of ALLTEL Communications, Inc.'s Reply Brief. A copy of this filing has been sent this date to counsel for all parties of record. Thank you.

Sincerely,

  
Brent Stewart

CBS/bt

Enclosure

cc: Counsel for all parties of record  
Suzanne McCormick

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>  
APR 06 2001  
Missouri Public  
Service Commission

In the Matter of the Investigation into the )  
Effective Availability for Resale of )  
Southwestern Bell Telephone Company's ) Case No. TO-2000-667  
Local Plus Service by Interexchange )  
Companies and Facilities-Based Competitive) )  
Local Exchange Companies. )

**REPLY BRIEF OF INTERVENOR**  
**ALLTEL COMMUNICATIONS, INC.**

Intervenor ALLTEL Communications, Inc. ("ACI") respectfully submits this Reply to the matters raised in the Initial Briefs of Southwestern Bell Telephone Company ("SWBT"), the Staff of the Commission ("Staff"), and the Missouri Independent Telephone Company Group ("MITG"), and the Small Telephone Company Group ("STCG"). Matters these parties raise that are not addressed in this Reply have been addressed in ACI's Initial Brief.

**I. SWBT**

SWBT begins its Initial Brief with the statement that "[t]he evidence in this case demonstrates *unequivocally* that Southwestern Bell has made Local Plus *fully available* for resale to IXC's and CLECs, and will allow CLECs to use its switch, through their purchase of unbundled network elements ("UNEs"), to offer their own expanded calling services that could be either *exactly like* Local Plus or customized in some fashion as determined by the CLEC".<sup>1</sup> What the evidence in this case actually demonstrates unequivocally is that:

1) SWBT has not made Local Plus available—let alone "fully"—to UNE-based or facilities-based CLECs because SWBT refuses to offer UNE-based and facilities-based CLECs Local Plus

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<sup>1</sup> SWBT Initial Brief, at 1 (emphasis supplied).

dialing pattern functionality at the Commission-ordered wholesale discount and that SWBT will not make Local Plus available at all where the CLEC uses its own switch; and

2) SWBT further refuses to allow UNE-based and facilities-based CLECs to offer Local Plus service (or their own expanded calling services which are “*exactly like*” Local Plus) without these CLECs paying terminating access to SWBT, even though SWBT does not impute terminating access to itself nor require payment of terminating access by pure reseller CLECs to SWBT.

Today when Local Plus is provided by SWBT to its own customers, SWBT does not pay/impute terminating access charges to itself.<sup>2</sup> In lifting the imputation requirement for SWBT and imposing in lieu thereof the resale/wholesale discount requirement in Case No. TT-98-351, the Commission at page 18 of its Report and Order stated that:

“...it is SWBT’s position that making a service available for resale guards against being priced under cost and, therefore, imputation of access charges is not necessary. She [SWBT witness Reiter] stated that, since SWBT is the underlying carrier, it is assuming the risk and will be the one harmed if the service is priced inappropriately”.

Whether SWBT’s Local Plus service is *in fact* priced under cost was a hotly contested issue left officially unresolved (due to the implementation of the resale/wholesale discount requirement) in Case No. TT-98-351 and again has arisen in this proceeding. If SWBT was

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<sup>2</sup> That the Commission has historically and routinely imposed an “imputation requirement” on SWBT’s toll (non-local) services as a competitive safeguard is well established and has as its basis the long standing language contained in Section 392.400 RSMo 2000. The Commission went to great lengths to interpret the requirements of Section 392.400 in two significant past cases, *In the Matter of Southwestern Bell Telephone Company’s Application for Classification of Certain Services as Transitionally Competitive*, 1 Mo. P.S.C. 3<sup>rd</sup>, 479 (1992), and *In the Matter of Southwestern Bell Telephone Company Tariffs to Establish Rate Bands for Services Which Have Been Found to be Transitionally Competitive*, 3 Mo. P.S.C. 3<sup>rd</sup>, 362 (1995). The Commission first imposed an imputation requirement in Case No. TO-84-222 et al., 28 Mo.P.S.C. (N.S.) 535 (1986), and since that time has either imposed the imputation requirement, or in lieu thereof imposed a resale/wholesale discount requirement, in order to ensure fair competition. See, e.g., Case No. TT-92-304 (1993); Case No. TT-94-218 (1994); Case No. TT-96-268 (1996).

required to impute terminating access to itself for Local Plus, it is only logical to assume that the current price to existing SWBT customers for Local Plus would be higher than it currently is since the cost of terminating access would have to be included in the price. Regardless of whether SWBT has priced Local Plus under cost, ACI agrees that the Commission need not now require SWBT to provide full blown cost studies and impose an imputation requirement, *provided* that SWBT's competitors—including UNE-based and facilities-based competitors—are protected from predatory pricing through the alternative regulatory safeguards currently in place for pure reseller CLECS by virtue of Case No. TT-98-351. If such safeguards are not made applicable to all of SWBT's competitors, the Commission-imposed safeguards are rendered meaningless and the statutory requirements of Section 392.400 RSMo 2000 have not been met.

In addition, the Commission-approved treatment of terminating access charges in Case No. TT-98-351 is part and parcel of the Local Plus service offering itself. It strains credulity to fail to consider the cost of terminating a Local Plus call as part of the cost of providing Local Plus and presumably SWBT has done so in establishing its Local Plus retail (and therefore its wholesale) rates. As Staff notes in its Initial Brief, SWBT should be responsible for paying terminating access to third party LECs because SWBT has received the wholesale rate as compensation for handling and terminating Local Plus calls.<sup>3</sup> No party—not even SWBT—has suggested that it would be appropriate for pure reseller CLECs to pay terminating access to either SWBT or to third party ILECs for Local Plus calls. The Commission's treatment of terminating access charges in Case No. TT-98-351 should encompass not only SWBT and pure reseller CLECs, but also UNE-based and facilities-based CLECs as well.

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<sup>3</sup> Staff Initial Brief, at 6, citing Solt Tr. 285-86, 339-40.

In this proceeding and in its Initial Brief, however, SWBT would have the Commission permit SWBT to continue to disadvantage and discriminate against its UNE-based and facilities-based CLEC competitors by imposing additional costs and obligations on such CLECs through payment of terminating access. Such discrimination is clearly anti-competitive in that it singles out and requires certain types of SWBT's competitors to pay more to provide Local Plus than pure reseller CLECs or than SWBT itself, with the obvious result of making it uneconomical for UNE-based and facilities-based CLECs to offer the service. (Tr. 349-371). Most egregious is SWBT's demand that UNE-based and facilities-based CLECs provide SWBT with an access charge revenue windfall by paying *SWBT* terminating access. (Ex. 9, Redfern/Krajci Surrebuttal, at 7).

Such discrimination with regard to the provision of Local Plus (or a service "exactly like" Local Plus) is prohibited by statute. Section 392.200.2 RSMo 2000 provides:

"No telecommunications company shall directly or indirectly or by any special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to telecommunications or in connection therewith, except as authorized by this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to telecommunications under the same circumstances and conditions."

Moreover, Section 392.200.3 RSMo 2000 provides:

"No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages".

In order to attempt to get around these statutes, SWBT appears to be asking the Commission to

classify the same or functionally equivalent service differently based solely on the type of SWBT competitor. If the service to be offered has exactly the same dialing pattern functionality, exactly the same calling scope, and is otherwise for all intents and purposes marketed to customers as “resold” Local Plus service, SWBT’s approach violates these statutory provisions.

SWBT’s attempt to deny the benefits of its Local Plus service to customers of UNE-based and facilities-based CLECs also violates the intent and purposes of Chapter 392, which in Section 392.200.4(2) RSMo 2000 states:

“It is the intent of this act to bring the benefits of competition to *all customers* and to ensure that incumbent and alternative local exchange telecommunications companies have the opportunity to price and market telecommunications services to *all prospective customers* in any geographic area in which they compete.”

The question of who should or should not pay terminating access charges for Local Plus service should be examined in light of what the Commission already has found with regard to access charges generally in the context of an emerging competitive environment. The Commission has defined the rates charged for access as “the rates that a local telephone company charges a *long distance telephone company* for ‘access’ to its subscribers in completing a *long distance* call”.<sup>4</sup> The Commission’s definition of access rates flies in the face of SWBT’s continuing attempts to classify Local Plus as purely local in nature (and therefore, subject to CLEC-specific, local traffic interconnection agreements) as opposed to Local Plus being classified as a hybrid service subject to the unique regulatory framework set forth in Case No. TT-98-351.

The Commission has further found that “access rates have historically been set above cost

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<sup>4</sup> *In the Matter of the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri*, Case No. TO-99-596, Report and Order issued June 1, 2000, at 15 (emphasis supplied).

and the excess earnings thereby realized have been used to effectively subsidize the cost of local telephone service",<sup>5</sup> and that SWBT "has price cap status and, consequentially, may freely raise its rates, including exchange access rates, without cost-justification so long as the annual increase does not exceed a percentage set by statute".<sup>6</sup> It is patently unfair and anti-competitive for SWBT to demand to receive terminating access for Local Plus calls only from UNE-based and facilities-based competitors while at the same time SWBT is relieved of the usual access charges imputation requirement and does not require pure reseller CLECs to pay terminating access to third party ILECs for Local Plus.

SWBT's claim that it is unfair for SWBT to have to pay facilities-based CLECs terminating access, and its claim that it is somehow unfair for UNE-based and facilities-based CLECs to provide and receive revenues from other non-Local Plus services they can offer through the purchase of UNEs from SWBT, are red herrings. The real issue in this case is whether SWBT, as the dominant incumbent LEC who unilaterally has determined the price, terms, conditions and calling scope of its Local Plus service, is using this service as a barrier to entry to its UNE-based and facilities-based competitors. The payment of terminating access to such CLECs by SWBT is no different than the payment of terminating access to third party ILECs by SWBT. The cost to SWBT of these access charges should have been factored into the retail cost of Local Plus service in the first instance. SWBT further receives compensation, as approved by the Commission, for all UNEs purchased by CLECs. The solution to any inequities which may exist, if any, lies outside the scope of this proceeding. In any case the solution is **NOT** to allow

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<sup>5</sup> *Id.*, at 16.

<sup>6</sup> *Id.*, at 18.

SWBT to define its way out of its Local Plus resale obligation for an arguably under priced service and thereby erect a barrier to entry for UNE-based and facilities-based competitors.

In its Initial Brief, SWBT attempts to justify its discriminatory access charge proposal based on a strict definition of resale and the technical provisioning of Local Plus by certain types of competitors. SWBT's argument that a CLEC cannot "mix" the resale of Local Plus with UNE-type provisioning of other CLEC services (Tr. 118-119), is contrary to how CLECs operate as recognized by the Commission in its earlier finding that:

"The CLEC may configure itself in several ways: it may buy services from the ILEC at a discount and resell them to subscribers or it may use facilities of its own to provide services to subscribers. In the latter case, the CLEC may either build its own facilities or rent facilities at a discount from the ILEC. ***Generally, a CLEC will configure itself to use a mixture of these business methods.*** For example, a facilities-based CLEC might have its own switch, but rent other network components such as local loops from the ILEC. These rented components are referred to as unbundled network elements (UNEs)."<sup>7</sup>

In its Initial Brief, SWBT alleges that ACI is trying to "avoid its responsibility under its interconnection agreement and prior Commission orders to pay the terminating access expense on its customers' traffic and shift those expenses to Southwestern Bell".<sup>8</sup> ACI is seeking to do nothing of the kind. Since Local Plus traffic has not been classified as local traffic by this Commission, ACI's interconnection agreement with SWBT does not apply. In suggesting that ACI as a facilities-based CLEC not be required to pay terminating access to SWBT or to third party ILECs for the termination of Local Plus traffic, ACI is simply requesting the same regulatory treatment currently afforded to SWBT itself and to pure reseller CLECs.

In its Initial Brief SWBT claims that ACI is somehow "seeking to obtain for itself a flat-

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<sup>7</sup> *Id.*, at 18-19 (emphasis supplied).

<sup>8</sup> SWBT Initial Brief, at 2. This notion also is discussed at page 5.



rated switched access service, which neither Southwestern Bell nor any other carrier in the state (or in the nation) offers.<sup>9</sup> This assertion is ludicrous on its face since SWBT has indicated that Local Plus is simply a “dialing pattern functionality” (Tr. 85-86, 135) and since it is well established in the record of this case that SWBT and approximately nineteen pure reseller CLECs currently are offering Local Plus service. SWBT then cites *State ex rel. Southwestern Bell Tel. Co. v. Public Service Commission* (the Bellflower case) for the proposition that it is unlawful to force SWBT to provide a service it has not voluntarily held itself out to offer. Unlike the Bellflower case, where the Commission attempted to require SWBT to *expand its basic local service territory* over SWBT’s objection, all ACI and the other parties are asking here is that the Commission require SWBT to make its existing Local Plus service dialing pattern functionality available to UNE-based and facilities-based CLECs upon the same terms and conditions that SWBT provides the service itself or makes it available to reseller CLECs, *i.e.* at the wholesale discount and without the obligation to pay terminating access charges.

Finally, SWBT in its Initial Brief has suggested that the Commission in this case should somehow adopt SWBT’s position simply because only one competitor—ACI—has chosen to participate in this proceeding. ACI has no way of knowing why other competitors have chosen not to participate but suggests that just because only one competitor has chosen to expend the resources necessary to oppose SWBT in this case does not mean that ACI’s position is somehow any less credible or correct. In fact, of the parties actually in this case none support SWBT’s narrow reading of the Commission’s Report and Order in TT-98-351, except of course for SWBT. Internal resource commitments, regulatory priorities in Missouri and other states, and

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<sup>9</sup> *Id.*, at 22.

differing service roll out or business plans could just as easily account for the lack of participation by other competitors as any speculation on SWBT's part of widespread competitor acquiescence to SWBT's position. In any event, the Commission is required to base its decision in this case on the weight of the competent and substantial record evidence presented, not upon speculations or a head count of participating competitors.

## II. Staff

In Staff's Statement of Position filed on January 2, 2001, Staff stated that SWBT should be responsible for the payment of terminating access charges to third party ILECs when Local Plus was offered through a facilities-based purchase of unbundled switching from SWBT and when Local Plus was being offered through a facilities-based carrier's own switch. In its Initial Brief, however, Staff appears to have changed its position, at least to some degree, to suggest that CLECs should pay terminating access where the CLEC was not "reselling" Local Plus.

It is unclear to ACI whether ACI and Staff actually disagree on this issue. ACI does not contest and has not contested that facilities-based CLECs should be required to pay terminating access to third party ILECs if the traffic in question is **NOT** Local Plus traffic and access compensation is otherwise required (*e.g.* toll). Terminating access to SWBT and third party ILECs would be appropriate if a CLEC provided some sort of expanded local calling plan that did not mirror SWBT's Local Plus service, for example, a plan with less than or more than a LATA-wide calling scope. Where the CLEC, however, is providing Local Plus service or a service *exactly* like Local Plus service—regardless of how the service is actually provisioned—ACI believes that the CLEC should be afforded the same regulatory treatment as is afforded to pure reseller CLECs who provide Local Plus. To do otherwise is not only anti-competitive, but unlawful under

the statutory provisions previously cited.

In any event it is important for the Commission to recognize that Staff does clearly agree with ACI that it is entirely inappropriate for UNE-based and facilities-based CLECs to pay *SWBT* terminating access for *Local Plus* traffic under any circumstances.<sup>10</sup>

### III. MITG/STCG

ACI generally concurs with the Initial Briefs filed by MITG and STCG and specifically supports their position regarding the inappropriateness of the use of interconnection agreements to govern the provision of Local Plus traffic by UNE-based and facilities-based CLECs since Local Plus has not been classified as a local service. Local Plus is a unique and important service and the Commission has the lawful authority to craft unique regulatory conditions and safeguards applicable to the provision of this service, even if the terms of a negotiated interconnection agreement might otherwise arguably apply.<sup>11</sup> Furthermore, since SWBT has the existing business relationship with third party ILECs, since Local Plus is SWBT's service, and since SWBT currently is the "gatekeeper" of all Local Plus traffic at this time, it only makes sense for SWBT to be ultimately responsible to third party ILECs for Local Plus billing records. Requiring SWBT to rely on the accuracy of Local Plus billing records provided by ACI under ACI's Local Plus provisioning proposal is nothing more than SWBT requiring the third party ILECs to rely on the accuracy of Local Plus billing records provided by SWBT.

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<sup>10</sup> Staff's Initial Brief, at 5.

<sup>11</sup> The Commission has done so in the recent past. See, *In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service After the Passage and Implementation of the Telecommunications Act of 1996*, Case No. TO-99-483, Report and Order issued September 7, 2000; *In the Matter of the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri*, Case No. TO-99-596, Report and Order issued June 1, 2000 (rate cap imposed on otherwise competitive companies to protect the public interest).

#### IV. Conclusion

In essence, all ACI is asking for in this case is parity with what SWBT offers itself under its Local Plus plan; *i.e.* toll pricing that is not burdened with the added expense of intraLATA access. If the Commission were to require SWBT to impute access into the price the Commission allows SWBT to charge its customers for the service, ACI could financially compete as a facilities-based CLEC. ACI cannot financially compete, however, if ACI has to pay full terminating access for virtually every minute of use while SWBT is only required to pay access on a small portion of its overall Local Plus minutes of use.

Requiring SWBT to provide full blown cost studies and impute access charges for its Local Plus service is one statutory option available to the Commission to insure SWBT's local plus service is not priced under cost and is therefore not anti-competitive. While this would be acceptable from ACI's perspective, ACI recognizes that the Commission for good, practical reasons has declined to do so in the past and has instead crafted regulatory safeguards to place the risk on SWBT and to attempt to insure the service offered by SWBT is not anti-competitive.

The Commission in this proceeding need not get bogged down in SWBT's proposed definitional distinctions which, if adopted, will have the continuing result of barring UNE-based and facilities-based CLECs from offering Local Plus service under the same terms and conditions currently only available to SWBT and to pure reseller CLECs. Instead, the Commission should simply make its existing Case No. TT-98-351 regulatory safeguards clearly applicable to UNE-based and facilities-based CLECs by ordering SWBT to provide Local Plus dialing pattern functionality at the wholesale discount, and without an additional terminating access charge obligation, to all SWBT's competitors.

Respectfully submitted,

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ATTORNEY FOR ALLTEL  
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**Certificate of Service**

The undersigned hereby certifies that a true copy of the foregoing was sent this date to counsel for all parties of record in Case No. TO-2000-667 by depositing a copy of same in the U.S. Mail, first class postage prepaid, or by hand-delivery, this 6<sup>th</sup> day of April, 2001.

Charles Brent Stewart