

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of an Investigation for the Purpose)
of Clarifying and Determining Certain Aspects)
Surrounding the Provisioning of Metropolitan) Case TO-99-483
Calling Area Service after the Passage and)
Implementation of the Telecommunications)
Act of 1996.)

GABRIEL COMMUNICATIONS OF MISSOURI, INC.'S
INITIAL BRIEF

Introduction

Gabriel and the other CLECs, and all metropolitan area customers of all companies, need the immediate termination of SWBT's interference with CLEC participation in the Commission's MCA Plan. The Commission needs to restore the full scope and benefits of the MCA Plan to all consumers.

Facilities-based competition was a high priority goal of both the Telecommunications Act of 1996 and Missouri SB507. As facilities-based competitors concentrated their start-up efforts in densely populated areas (for very real economic reasons), they were subjected to sustained criticism that they were "cherry picking" or that they had no interest in serving residential or less profitable markets. Now that the bases of facilities have been laid, competitors have naturally extended the reach of their facilities to more outlying suburban areas. Unfortunately, they find that they are unable to compete in these areas, because certain ILECs – in particular SWBT - refuse to recognize any of the CLECs' NXX codes for these outlying areas as being MCA codes. SWBT is effectively blocking local traffic to CLEC customers, by forcing its own customers to dial extra digits and pay toll charges. As a result, SWBT is completely undermining the Commission's MCA plan and the purposes of local competition.

By design, SWBT is unilaterally diluting the calling scope afforded its customers under the Commission's MCA plan simply because other customers are changing carriers to CLECs.

The calling customers are not happy, and they let the called CLEC customers know it. The new CLEC customers, particularly business ones, then feel pressured to switch service back to the incumbent. The anti-competitive purpose of these actions is patently obvious, notwithstanding attempts to excuse such actions as being in "strict" compliance with the original MCA order without regard to subsequent developments and actions by the Commission.

SWBT has taken it upon itself to obstruct CLEC participation in the MCA Plan. SWBT admits MCA is in the public interest, yet it denies both its own customers and CLECs' customers the full toll-free calling scope designed by the Commission. SWBT's actions have diluted the benefits of the MCA Plan for customers that choose to switch to competitive local service providers by blocking calls and reducing the number of people that can call those customers toll free. The competitors suffer as well, of course. Likewise, SWBT harms its own customers by imposing rate and dialing disparity upon them, forcing them to dial and pay for toll calls that were previously local calls before the called party changed providers. These problems grow worse every day.

At this point, all parties appear to agree that the Commission should allow full CLEC participation in the MCA. Everyone seems to recognize the clear anti-competitive impact of allowing the provider of 97% of the lines to have a calling plan that provides benefits based on the overwhelmingly larger size of its monopoly - created customer base. Yet that is what has resulted from SWBT's obstruction of CLEC participation in the MCA Plan. SWBT's customers can receive toll-free calls from other SWBT customers, but CLEC customers cannot receive toll-free calls from SWBT customers.

To assure full competitive participation in the MCA by CLECs, five actions are required from the Commission:

Number one, first and foremost, restore the MCA Plan. Require the ILECs to recognize CLECs and their MCA subscribers as participants in the Plan, entitled to the full benefits of the Plan, including eligibility for toll-free calling by subscribers of other CLECs and ILECs in accordance with the Plan as it was conceived by the Commission.

Number two, preserve competitive benefits by allowing CLECs and ILECs to offer greater calling scopes and better prices consistent with the different levels of PSC supervision of CLECs versus ILECs.

Number three, allow existing interconnection agreements to run their course and deal with any intercompany compensation issues between competing interconnected carriers if and when presented under the Telecommunications Act. It's absolutely essential that parties be able to rely on their contracts and the business plans that they have developed in accordance with those contracts.

Number four, allow all adjoining LECs to continue to exchange MCA traffic on a bill-and-keep basis unless and until they mutually agree to another arrangement.

Number five, prohibit Southwestern Bell and the other ILECs from imposing any additional charges on CLECs as a consideration for ILECs complying with the MCA Plan, and deny any and all efforts by the incumbents to collect compensation for their competitive losses. MCA subscribers are entitled to the full benefits of the Plan, regardless of the carrier they select. And no carrier is entitled to compensation on a subscriber who elects to choose a new provider.

By taking these five steps, the Commission will restore the full benefits of its MCA Plan and it will preserve the benefits of competition for consumers. It is essential to eliminate the obstacles to competition that have been unilaterally erected by SWBT by its self-serving and fluctuating misinterpretation of its MCA tariffs and dilution of the benefits of the MCA Plan to consumers. The Commission needs to terminate SWBT's anti-competitive screening, blocking and surcharge practices.

a. Are CLECs currently included in the MCA Plan, and, if not, should CLECs be permitted/required to participate in the MCA Plan?

By the time of the hearing, all parties agreed that CLECs should be able to participate in the MCA Plan. It is an obvious conclusion. (Matzdorff, Tr. 1201). MCA traffic

comprises the vast majority of local traffic in the metropolitan areas. (Voight, Tr. 211). Local competition is only developing in the metropolitan areas thus far on both a resale and facilities basis. (Cadieux Direct, p. 9). Exclusion of CLECs from the MCA would constitute an unlawful barrier to competitive entry, in violation of Section 253 of the Telecommunications Act of 1996, which would undeniably deprive consumers of the intended benefits of local competition. (Cadieux, Rebuttal, p. 8; Meisenheimer, Tr. 297, 313).

Mr. Cadieux addressed the impropriety of excluding CLECs from the MCA at the hearing.

Q. Mr. Cadieux, yesterday you went through some questions from Southwestern Bell regarding Gabriel's authority to provide MCA service.

Whether or not Gabriel in the past or today is authorized to provide MCA service, do you think it would be appropriate for the Commission to, on a going-forward basis, exclude CLECs participating in the MCA?

A. No. It's my position it would not be proper, and it's my position that that would, because of the requirements of the Telecom Act opening up all services to -- telecommunications service to competition, that that would be illegal.

Q. What impact would it have on a CLEC or on the CLEC industry as a whole with, as we've seen in the record, 3 percent of the access lines being excluded from providing a service that Southwestern Bell with 97 percent of the access lines is allowed to provide? What kind of impact is that?

A. I think the impact, you're seeing that in part with the testimony of some of the CLECs in the case here, that what it does is it creates an extreme disincentive for a facility-based CLEC to offer service in any of the outer zones of the MCA.

I mean, the ironic thing is it basically gives an incentive for the CLEC to restrict its serving area to the core metropolitan areas and prevent them from going out into the broader metropolitan area on a facilities basis.

(Tr. 838-39). As SWBT witness Hughes admitted, absent participation in the MCA, CLECs by definition could not effectively compete in the outer tiers of the metropolitan areas given the huge disparity in available local calling scopes (incumbent v. new entrant) that would result. (Tr. 1019-20).

A substantial portion of the pre-filed testimony is devoted to a debate over whether CLECs are already MCA participants. That discussion can be distilled into the following undisputed points:

- In 1992, the Commission established its MCA Plan to address the expanded local calling needs of consumers in the metropolitan areas. (Cadieux Direct, p. 5-7). In the Order, the Commission expressly stated its primary goal was to deliver benefits to consumers. The Plan was the Commission's creation – it was not the proposal of any particular party. The Plan required that MCA be made available by all LECs in the specified exchanges to all customers.¹
- Since 1992, the Commission has taken preservation of the benefits of MCA service for consumers as a given.²
- In 1996, Congress passed the Telecommunications Act, the Missouri Legislature passed a companion bill, and the FCC adopted various rules, to accommodate and encourage the development of competitive local telecommunications. The Act prohibits barriers to entry to the provision of local service (§ 253), requires incumbents to interconnect with new entrants on a just, reasonable and non-discriminatory basis (§ 251), requires all carriers to provide dialing parity (§ 251(b)(3)), and requires interconnecting carriers to establish reciprocal compensation for

¹ Mr. Cadieux provides additional information on the history and design of the MCA Plan at pages 5-7 of his Direct Testimony. See In the matter of the establishment of a plan for expanded calling in metropolitan and outstate exchanges, Case No. TO-92-306, Report and Order, 2 MoPSC 3d 1 (1992).

² In 1995, the Commission allowed Cass County to purchase several GTE exchanges. Continued MCA service was taken as a given. 3 MoPSC 3d 313. In 1996 the Commission approved the Dial US/SWBT resale agreement expressly approving resale of MCA by CLECs and stating that MCA is an essential part of incumbent LECs' service to consumers. 5 MoPSC 3d 133. In that case and the subsequent ATT/SWBT arbitration, provision of MCA by facilities-based CLECs was taken as a given. 5 MoPSC 3d 274. In 1997, when the Commission terminated COS, it did so in part based on the continued availability of MCA service to all consumers in the pertinent exchanges without regard to the identity of their local service provider. 6 MoPSC 3d 531.

the transport and termination of local traffic (§ 251(b)(5)). (Cadieux Direct, p. 8-9, Rebuttal, p. 6).

- CLECs are already certificated to provide MCA service and do not need further authority. (Cadieux Rebuttal, p. 7-8, Dale Rebuttal, p. 3, Surrebuttal, p. 3; Hughes Tr. 1004-05, 1040-41).³
- The Commission expressly authorized CLECs to provide MCA service in several interconnection cases.⁴
- CLECs typically already have approved tariffs to provide MCA service, often at rates below the ILECs and often in conjunction with additional outbound toll-free calling. (Cadieux Rebuttal, p. 7-8; Dale Rebuttal, p. 3-4, Surrebuttal, p. 3).
- CLECs were initially recognized as full MCA participants, but then sometime in 1997 SWBT (and as a result the other ILECs) changed practices and ceased to recognize CLECs as MCA participants. (Stowell, Tr. 368).⁵
- CLECs are still providing outbound MCA service and their MCA customers receive toll free calls from ILEC MCA subscribers when the CLECs serve as resellers of ILEC MCA service or as facilities-based providers when the customers were formerly subscribers to ILEC MCA service and their telephone numbers were ported when they switched carriers to the CLECs (but other CLEC customers cannot receive toll-free calls from customers served by resale or ported numbers). (Cadieux Surrebuttal, p. 3; Dale Surrebuttal, p. 3; Unruh Rebuttal, p. 6; Hughes, Tr. 1009-11).
- CLEC's typically already have approved interconnection agreements that provide for reciprocal compensation for MCA traffic exchanged between the CLECs and the ILEC with whom they are directly interconnected – usually SWBT. (Cadieux Rebuttal, p. 7-8; Dale Rebuttal, p. 3, Surrebuttal, p. 3).
- CLECs and ILECs operating in adjoining service areas (i.e. not competing head-to-head and not directly interconnected) have at

³ Ms. Dale sponsored the testimony of Mr. Phillips at the hearing.

⁴ Dial US/SWBT, 5 MoPSC 3d 133; ATT/SWBT, 5 MoPSC 3d 274.

⁵ SWBT witness Hughes continued to contend at the hearing that SWBT never has considered CLECs to be MCA participants (Tr. 1008), but SWBT did not contest Mr. Stowell's testimony that SWBT initially instructed his company to recognize CLEC NXXs as MCA codes (Tr. 368) and SWBT did not contest the fact that it told the Commission during the AT&T/SWBT arbitration that CLECs would be full MCA participants (Tr. 1007-08). See infra note 11.

least in some instances been exchanging MCA traffic on a bill-and-keep basis. (Dale Rebuttal, p. 3, Stowell, Tr. 367).

- Access tariffs are in place and control the exchange of non-MCA traffic between LECs operating in adjoining areas (Tr. 1040-41).
- Currently, CLECS cannot fully participate in the MCA because SWBT screens and blocks its customers calls, so that its MCA subscribers cannot call CLEC MCA subscribers in outer tiers on a toll-free basis. (Cadieux Direct, p. 10, Rebuttal, p. 3; Dale Surrebuttal, p. 3-4).

Thus, CLECs have been participating in the MCA at least in some respects and all parties agree that CLECs should fully participate in the future. There is a semantic debate over whether in this case the Commission is engaged in restoring CLECs to full participant status or in completing the process of admitting CLECs as full participants. This debate is important in terms of SWBT's potential liability for interfering with CLEC participation in the past, but really is not all that important for purposes of moving forward. No matter how its action is characterized, the Commission needs to ensure that CLECs are full competitive MCA participants going forward.

Mr. Cadieux and Mr. Kohly outlined the steps the Commission needs to take to assure that CLECs can fully participate in the MCA on a competitive basis, as follows:

- (1) Prohibit SWBT's MCA screening and blocking practices, prohibit any other type of blocking including interference with resale or use of number portability, and direct all MCA participants - CLECs and ILECs - to recognize the other participants' designations of NXX codes as MCA codes.⁶
- (2) Eliminate SWBT's discriminatory surcharges on CLECs for MCA calls from SWBT customers.⁷

⁶ The elimination of SWBT's anti-competitive screening and blocking tactics is discussed below in this section of the Brief. The administration of the NXX code designation process is discussed under issue e.

⁷ The impropriety of SWBT's MOU surcharge is discussed under issue g.

- (3) Allow CLECs and ILECs continued pricing flexibility for MCA service pursuant to the applicable statutes.⁸
- (4) Allow CLECs and ILECs continued flexibility to combine additional outbound toll-free calling with MCA service.⁹
- (5) Allow CLECs and ILECs operating in adjoining service areas to continue to exchange MCA traffic on a bill-and-keep basis, and allow CLECs and ILECs that directly interconnect to continue to exchange MCA traffic pursuant to the reciprocal compensation provisions of their approved interconnection agreements.¹⁰

(Cadieux Direct, p. 33; Tr. 827-30; Kohly Direct, p. 27). The other CLECs support this action plan. (Dale Rebuttal, p. 3, Tr. 879; Mellon, Tr. 570, Starkey, Tr. 614; Cowdrey, Tr. 909). It also appears that the ILECs concede that these steps would be sufficient to achieve full competitive participation in the MCA Plan by CLECs. (Matzdorff, Tr. 1202; Hughes Tr. 1040-41). These steps can be further summarized: (I) stop SWBT's anticompetitive MCA screening and surcharge practices (and thereby restore CLECs to their undisputed proper status as full MCA participants); and (II) preserve the status quo regarding the competitive provision of MCA service pursuant to existing certificates, tariffs, interconnection agreements, and bill-and-keep arrangements. (Cadieux Rebuttal, p. 43-44, Dale Rebuttal, p. 10).

Another large portion of the pre-filed testimony is devoted to the unlawfulness of SWBT's MCA screening and blocking tactics. Now that the parties, including SWBT, agree that CLECs should be full MCA participants, it appears that there is no dispute that all screening and blocking tactics must cease. Unfortunately, even though SWBT concedes its customers like MCA service (Tr. 1036), and even though SWBT told the Commission during the AT&T

⁸Continued pricing flexibility is discussed under issue d.

⁹ Continued calling scope flexibility is discussed under issue b.

¹⁰ Continued use of existing inter-company compensation arrangements is discussed under issue f.

arbitration that CLECs should and would be able to participate fully in the MCA Plan (Tr. 1007-08),¹¹ and even though SWBT completely failed to articulate any legitimate basis for its screening and blocking tactics when its practices were challenged on cross-examination (Tr. 1002-16),¹² it also appears that SWBT will not cease and desist without an order from the Commission in this case.¹³

¹¹ As Mr. Cadieux testified:

As summarized by the Commission, SWBT contended that "if AT&T and MCI do not pay access charges, SWBT will suffer financial losses and 'be unable to effectively compete through its MCA offerings.' The current bill and keep arrangement would allow AT&T and MCI to offer MCA service to its customers without charging them the MCA additive." Arbitration Order, p. 40, Case No. TO-97-40 (December 11, 1996).

It is noteworthy that SWBT did not contend in the arbitration, as it does now, that CLECs could not participate in the MCA absent Commission action. Rather, as shown by the Commission's summary of SWBT's position set forth above, SWBT acknowledged that CLECs would be participating in the MCA and expressed concerns about its ability to compete with them. Specifically, in its Initial Brief to the Commission (citing the testimony of witness Bill Bailey), SWBT contended that "the MCA additive which is charged by SWBT is set sufficiently high that the carriers will be able to pay access charges while profitably providing 6+ to 40+ hours of MCA calls to customers while matching SWBT's MCA rates." SWBT also described AT&T and MCI as being "able to offer full termination from and to MCA areas." (SWBT Initial Brief, pages 73-74, Case No. TO-97-40).

(Cadieux Rebuttal p. 25 and 27).

¹² SWBT's witnesses contended in pre-filed testimony that in refusing to recognize CLECs as MCA participants SWBT was simply abiding by the Commission's initial MCA order. (Hughes Rebuttal, p. 2). Yet, on cross-examination, Mr. Hughes admitted the following:

- the ILECs implemented the Commission's MCA order by filing tariffs (Tr. 1002-04);
- SWBT's tariff states that its MCA subscribers can call all "subscribers" in the mandatory zones and common optional zones and all MCA "subscribers" in the other optional zones. (Tr. 1011-12) (See also Exhibit 59 appended to this Brief as Appendix A).
- Without any tariff changes, Commission order, or ILEC consent, SWBT has unilaterally varied its interpretation of the word "subscriber" in its tariff to mean in the first instance subscribers served by any company and in the second instance, at times only subscribers of original MCA participating ILECs and at other times also subscribers of CLECs that sign a private agreement with SWBT. (Tr. 1011-16). Mr. Stowell's testimony indicates that SWBT had a previous interpretation that the word "subscribers" meant subscriber of any company in all instances. (Tr. 368).

Hence, SWBT has not followed its tariff or any Commission order or rule. It has simply done whatever it felt like doing, to serve its own interests, and to obstruct and delay competitive entry into the local service market. All in complete disregard of the negative financial impact of imposing additional toll charges on its customers and the harm to competitors and their customers.

Given that it appears that all parties including SWBT concede that MCA screening and blocking should cease, Gabriel will not herein dwell long on the point that such practices are unlawful. For now suffice it to say that such practices not only violate the intent and purposes of the Commission's MCA Plan, but they also unlawfully impose dialing disparity and rate disparity on the calling party based solely on the fact that the calling party has chosen a local service provider other than SWBT. SWBT witness Hughes admitted that the change in provider was the sole determining factor. (Tr. 1029-30). If a SWBT MCA customer in an optional tier changes local providers to a CLEC and subscribes to the CLEC's MCA service, SWBT nonetheless will screen and block local calls from its MCA subscribers to that customer and force them to dial 1+ and pay toll charges. Such dialing and rate disparity violate the dialing parity requirements of Sections 3(a)(2)(39) and 251(a)(3) of the Act and FCC rules 47 CFR 51.205-215,¹⁴ the interconnection quality requirements of Section 251(a) of the Act, the prohibition against barriers to entry of Section 253 of the Act, the prohibition against discrimination of Section 392.200 R.S.Mo. Further, such disparities serve as a severe deterrent to customers considering whether to change local service providers or stick with such a change. Further, the impact of these practices on consumers is uniformly negative. (Cadieux Direct, p. 10-14, 17, 24-25, 30-31; Rebuttal, p. 12, 32-33; Surrebuttal, p. 3-6).

Hence, the Commission should prohibit any and all interference with CLEC participation in the MCA Plan, including SWBT's MCA screening and blocking practices. The

¹³ Of course, SWBT did not insist on such an order when Cass County entered the MCA Plan. (Tr. 1193). 3 MoPSC 3d 313.

¹⁴ 47 CFR 51.207 expressly requires:

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider. (Emphasis added).

Commission cannot accomplish the goals of its MCA Plan or comply with federal and state law without allowing the full competitive participation of CLECs.¹⁵

b. If permitted to participate in the MCA Plan, should CLECs be required to follow the parameters of the MCA Plan with regard to (a) geographic calling scope, (b) bill and keep inter-company compensation, (c) use of segregated NXXs for MCA service, and (d) price?

Sub-issues (b), (c) and (d) are identical to issues f., e., and d. respectively and are addressed accordingly later in this Brief.

Regarding geographic calling scopes, it does not appear that there is a contested issue beneath all the rhetoric. By the end of the hearing, all parties appeared to concur that CLECs should continue to be able to offer additional outbound toll-free calling in combination with MCA service, just as SWBT already does with its Local Plus service.

While the Commission could consider allowing CLECs the competitive discretion to establish their own MCA calling scopes, the multi-lateral nature of the MCA Plan probably justifies a requirement that CLEC MCA calling scopes be at least as large as the historic ILEC-to-ILEC calling scopes. As a practical matter, in all likelihood CLECs would meet this requirement voluntarily out of competitive necessity. Gabriel already meets such a minimum requirement for such reasons. (Cadieux Direct, p. 39-40, Rebuttal, p. 37, Surrebuttal, p. 8, 13).

There is no reason, however, to restrict CLECs from offering additional toll-free outbound calling beyond the scope of the current MCA geographic footprint in conjunction with MCA service. CLECs like Gabriel already offer such additional outbound toll-free calling, so

¹⁵ While CLECs should be allowed the competitive option of not offering MCA service, it probably is not a practical competitive option.

their customers already have the competitive choice of toll-free calling throughout the MCA areas without regard to whether the called party is an MCA subscriber or non-MCA subscriber of the CLEC or another carrier. The Commission should not order CLEC's to reduce such MCA-wide calling scopes now. Furthermore, CLECs should be able to offer even greater outbound toll-free calling scopes, just as SWBT already does with Local Plus (and presumably CLECs should be able to do already as resellers of Local Plus or otherwise).¹⁶ (Cadieux Direct, p. 40; Rebuttal, p. 37, Surrebuttal, p. 12-14).

As is the case with pricing flexibility, discussed below, it is essential that CLECs have the ability to differentiate their products through expanded calling scopes. (Voight, Tr. 211-12). Customers will not receive the benefits of competition absent such flexibility. (Cadieux Rebuttal, p. 35-36; Dale Rebuttal, p. 5). By continuing to allow such calling scope flexibility, the Commission will comply with Sections 392.185 and 392.200.4(2) and deliver the benefits of competition to consumers. Likewise, the Commission will comply with Section 253 of the Telecommunications Act by avoiding the creation of a barrier to competitive entry in the form of a calling scope restriction.

The ILECs attempted to create the impression that CLECs sought to compel the ILECs to reciprocally expand their toll-free calling scopes to match whatever the CLECs offered. Of course that is false. Indeed, it would be impossible for the ILECs to match multiple CLEC plans. Gabriel certainly has not made such a proposal. (Cadieux, Direct, p. 38; Surrebuttal p. 8, 16-17).

The independent ILECs also attempted to create the impression that CLECs seek to avoid access charges for the termination of toll-free calling outside the scope of the MCA

¹⁶ See Case No. TO-2000-667 (Local Plus Resale).

Plan. Again, such claims are false. Gabriel certainly acknowledges that it must pay terminating access charges to ILECs in adjoining areas for any toll-free calling outside the scope of the MCA Plan.¹⁷

CLECs merely want confirmation that the adjoining ILECs will terminate CLEC customers' MCA calls on a bill-and-keep basis just as the adjoining ILECs do for SWBT, and just as the CLECs have been doing for the adjoining ILECs. Likewise, CLECs expect interconnecting ILECs like SWBT to abide by the reciprocal compensation provisions of their interconnection agreements and charge local compensation – not access – for local traffic, just as the CLECs do for SWBT.¹⁸ (Cadieux Direct, p. 40-41). These matters are addressed in greater detail under issue f. below.

Next, the ILECs tried to create a panic over the possibility that CLECs would cause customer confusion by using the name “MCA” to market the combination of the historic MCA calling scopes and additional outbound toll-free calling. There was no evidence of any such confusion, so the entire discussion was pure speculation. Moreover, the CLECs all confirmed that they could live with a requirement that they only use the name “MCA” to refer to the original calling scope. Gabriel does not name its service “MCA” now. (Cadieux Rebuttal, p. 47, Surrebuttal, p. 14-15).

Nonetheless, as already indicated, CLECs must be able to offer “MCA” calling in conjunction with “other” calling, just as SWBT already does with regard to locally-dialed Local

¹⁷ Although not an issue before the Commission, the subject of reporting traffic for access charge billing purposes is discussed herein in conjunction with issue j.

¹⁸ The Commission has rejected prior LEC attempts to charge access for the termination of local traffic, both in the ATT/SWBT arbitration, 5 MoPSC 3d 274, and in the more recent Alma access tariff proceeding, Case No. TT-99-428.

Plus.¹⁹ Further, ILECs should not be allowed to suggest to consumers that they are the only authorized providers of MCA service. (Cadieux Rebuttal, p.47-48, Surrebuttal, p. 14-15).

When all was said and done, all of the parties who had tried to make an issue out of calling scopes essentially indicated that they did not oppose CLECs having the ability to offer additional outbound toll-free calling in conjunction with MCA service with bundled rates, albeit under distinct service names. (Hughes, Tr. 1024-25; Meisenheimer, Tr. 296; Stowell, Tr. 373-77; Evans, Tr. 1162).

c. Should there be any restrictions on the MCA Plan (for example resale, payphones, wireless, internet access, etc.)?

The Commission should continue to permit resale of MCA service, as required by the Telecommunications Act. Any other proposed restrictions on use of MCA service should be strictly scrutinized in the context of the pro-competitive and non-discrimination purposes of the Telecommunications Act, FCC rules and decisions and state law. Any proponent of such a restriction should bear a heavy burden to show that the restriction is not contrary to federal and state law requirements, does not inhibit competition and is necessary to promote the public interest. Gabriel does not believe the need for any restrictions on the use of MCA service have been adequately demonstrated in this case.

d. What pricing flexibility should ILECs and/or CLECs have under the MCA Plan?

¹⁹ SWBT witness Hughes confirmed that SWBT has exercised such calling scope flexibility with Local Plus and that such additional calling did not disqualify it as an MCA participant. (Hughes, Tr. 1023-24). Mr. Evans of GTE agreed. (Tr. 1179).

The Commission should continue to allow CLECs to price MCA service on a competitive basis. The Commission has uniformly classified CLECs as competitive telecommunications companies and their services as competitive telecommunications services. (Cadieux Direct, p. 38, Surrebuttal p. 10). Such classification was recently reaffirmed in Case No. TO-99-596 (Report and Order, June 1, 2000). Competitive classification under Section 392.361 R.S.Mo. permits competitive pricing (tariff) adjustments under Section 392.500. CLECs have been providing MCA service on a resale basis, and to some extent on a facilities-basis particularly within the mandatory zones, using competitive pricing. (Cadieux Rebuttal, p. 7; Dale Rebuttal, p. 4-5). The Commission should abide by the competitive pricing statutes and allow such competitive pricing to continue. The Commission will thereby permit flexible regulation of competitive companies and bring the benefits of competition to customers in accordance with Sections 392.185 and 392.200.4(2) R.S.Mo.

Additionally, Section 253 of the Telecommunications Act of 1996 prohibits barriers to competitive entry, such as would be erected by a restriction against competitive pricing of MCA service, which service encompasses the vast majority of local traffic. (Voight, Tr. 211). As Mr. Cadieux testified:

- A. Price competition is an essential feature of a market that is, by law, open to competition. The dynamics of price competition among multiple providers creates the force that ensures the reasonableness of rates. The Commission should not accept SWBT's suggestion to make MCA service an enclave of collective pricing in a landscape of competition. To do so would harm the public interest by denying consumers the benefits of price competition. Moreover, such a restriction would violate the FTA's §253 prohibition against barriers to competition and thwart one of the fundamental purposes of the FTA and state law provisions authorizing competition in all telecommunications markets. SWBT's recommendation to prohibit price competition for MCA benefits SWBT and harms consumers.

(Cadieux Rebuttal, p. 35-36). The Commission simply cannot obstruct competitive local pricing under Section 253 of the Act.

Beyond the fact that federal and state laws require the Commission to allow CLECs competitive pricing flexibility, there is no public purpose or interest to be served by imposing minimum or maximum pricing constraints upon CLECs. As new market entrants, with less than 10% market share (Hughes Tr. 1019-20), CLECs have no market power and do not control facilities essential to service by others. CLECs confront entrenched, dominant monopoly providers in every local market. CLECs have no ability to sustain excessive prices on end users or to sustain predatorily low prices to impede competition. There is simply no statutory basis or policy reason to constrain competitive pricing of MCA service by CLECs. (Cadieux Direct, p. 37-38; Voight, Tr. 189; Kohly, Tr. 516-18).

Restricting CLEC pricing flexibility would totally contradict the purposes of opening local markets to competitive entry. On the one hand, CLECs are already charging lower rates than incumbents for MCA service, and there is absolutely no legitimate reason to require sudden rate increases now. On the other hand, while no CLEC may currently be charging more for MCA service than the ILECs, there is no reason either to prohibit CLECs from attempting to meet customer needs through competitive pricing packages for bundled services that include higher rates for MCA service, or to require CLECs to march in lock-step with any future ILEC MCA rate reductions. The pressures of the market will effectively constrain CLEC pricing of MCA services – that is the whole point of competitive entry.²⁰ (Cadieux Surrebuttal, p. 9-10; Dale Rebuttal, p. 5-6).

²⁰ In particular, regulated ILEC rates (whether price cap or rate of return) will continue to function as a de facto price ceiling for CLECs. (Voight, Tr. 189-90, Kohly, Tr. 489, Hughes, Tr. 1022-23). However, there still is no legitimate

As Staff witness Voight confirmed at the hearing, it is essential that CLECs have the ability to distinguish their MCA and other services from the services of the monopoly incumbents, including by means of price differentiation. (Tr. 211-12). Moreover, given that MCA service encompasses the vast majority of local traffic in the metropolitan areas (Tr. 211), absent competitive pricing and, as described above, competitive outbound calling scopes, consumers would receive no benefits from local competition. In essence, customers would be able to buy MCA from various companies, but would have no choice in price or service. (Cadieux Rebuttal, p. 35).

In the mandatory zones, MCA is basic local service. The rate for MCA service is the rate for basic local service. Absent competitive pricing flexibility for MCA service, there would be no basic local service price competition.

In the optional zones, MCA can be priced as an additional charge to basic local services (and has been so priced by the ILECs). While it is theoretically possible to have a uniform MCA additive for all companies, combined with continued pricing flexibility for basic local service and other services,²¹ such as artificial constraint on the MCA “additive” would at least somewhat impede competitive product differentiation and accomplish nothing. Consumers will compare the total charges for the total package of services. Companies will adjust their total charges to accomplish their competitive goals. An artificial constraint on the price of one rate element will not benefit anyone, will have little impact on total pricing strategies, and will only serve as an unnecessary annoyance.

reason for precluding a CLEC from proposing a higher rate for MCA service in conjunction with other offerings. Customers either will or will not like it, but the market should decide, not the Commission.

Regarding ILECs, the Commission should likewise continue to regulate pricing of MCA service in accordance with the applicable statutes. For price cap companies like SWBT, that means pricing flexibility subject to maximum allowable prices under Section 392.245 R.S.Mo. (Hughes, Tr. 1020-23). For rate-of-return companies, that means pricing flexibility subject to total earnings limitations under Sections 392.220-240 R.S.Mo. ILECs can and should be allowed to respond to competition, subject to statutes and other safeguards against predatory pricing. (Cadieux Direct, p. 36).

It should be noted that from the inception of MCA service, the Commission recognized that MCA prices were subject to change. (Dale Rebuttal, p. 5). See 2 MoPSC 3d 1, 20. Nonetheless, the ILECs have apparently refrained from reducing prices for MCA services. In particular, SWBT has not sought to reduce MCA prices, but rather has continued its monopoly pricing practices. (Cadieux Direct, p. 37, Hughes Tr. 1021). Indeed, even now SWBT wants to restrict competitive pricing rather than engage in it. (Cadieux Rebuttal, p. 36, Surrebuttal, p. 11-12). Only CLEC market entry has provided consumers with pricing benefits, subject to the ILEC interference with facilities-based competition that led to this case. It would be a substantial and detrimental step backward for the Commission to prohibit MCA price competition and lock-in monopoly local rates for all providers and customers. Instead, the Commission should allow consumers to benefit from competitive pricing forces. (Cadieux, Direct, p. 36).

It would also be detrimental to continue to allow pricing flexibility to competitors that are reselling ILEC MCA services at a discount, but to deny such flexibility to facilities-based competitors. Such a distinction would only serve to discourage facilities-based market entry (Meisenheimer, Tr. 296), and would be contrary to the public interest.

Staff supports full pricing flexibility for CLECs providing MCA service. (Voight, Tr. 184). Of course the CLECS also support it. Notwithstanding its remarkable monopoly adherence to fixed pricing in pre-filed testimony, SWBT ultimately acknowledged that it currently has pricing flexibility and CLECs should also continue to have it. (Hughes, Tr. 1024; Cadieux Surrebuttal, p. 7). No witness was able to articulate a legitimate objection. The small ILECs conceded they do not face any head-to-head local competition and have not experienced any problems from current CLEC pricing discounts in adjoining service areas. (Matzdorff, Tr. 1215-17). Public Counsel could not explain its position in response to cross-examination and questions from the bench, and ultimately indicated that pricing flexibility was acceptable so long as there was a uniform MCA additive in the optional tiers – even though such a uniform additive would not result in uniform prices.

Whether opposition to competitive pricing flexibility for CLECs is based on unfounded fears or anticompetitive intentions, there is no statutory or policy support for price regulation of competitive MCA service offerings of CLECs. CLECs have no market power and should be allowed to continue to price MCA service on a competitive basis. The Commission should also expressly allow ILECs pricing flexibility through applicable statutory procedures. One of the primary purposes of local competition is to afford consumers competitive rate alternatives.

e. How should MCA codes be administered?

Each LEC participating in the MCA, whether CLEC or ILEC, should provide notice to all other participating LECs and the Commission of the NXX codes it is using to provide MCA service. Such notice should be in verified form (such as an affidavit) and should

confirm that the NXX codes listed are associated with rate centers within the bounds of the geographic area of the Commission's MCA Plan and that the outbound calling scope of all customers assigned numbers within such NXX codes will be at least as large as prescribed by the Commission's MCA Plan. Such an attestation would eliminate any concerns that a carrier was somehow acting improperly. (Cadieux Direct, p. 34; Tr. 828-30; Kohly, Tr. 510-11, 521).

Each MCA participant should be required to honor the verified notices received from other carriers. No LEC should be permitted to act as a self-appointed gatekeeper – as SWBT has done to date – and make judgments about the validity of another carrier's notice or otherwise screen or refuse to recognize the designated MCA codes of another carrier. Any concern about the validity of another carrier's notice should be presented to the Commission for resolution and not resolved by vigilante action. While SWBT represented it would not act unilaterally, its past misconduct warrants a Commission order. (Hughes, Tr. 1017-18).

The ILECs acknowledged that this notification process was workable and sufficient. (Hughes 1017-18, Evans, Tr. 1179; Matzdorff, Tr. 1203).

CLECs should be allowed to have both MCA and non-MCA NXX codes, just like ILECs. CLECs should not have to designate all numbers as MCA numbers, as Mr. Voight proposes. (Cadieux, Direct p. 34). Otherwise, CLECs would not be able to offer true non-MCA service as an alternative and customers purporting to purchase any ersatz non-MCA service would nonetheless receive all the inbound calling benefits of MCA service for free. (Voight, Tr. 91-102). The Commission has already approved "bare bones" local exchange service offerings by CLECs like Gabriel. (Cadieux Rebuttal, p. 18). There is no reason to deny customers such options. While segregation of NXX codes into MCA and non-MCA categories has some number conservation impacts, these impacts are unavoidable under the present circumstances regarding

MCA calling scopes and will have to be dealt with in subsequent proceedings. (Voight, Tr. 91). Alternatively, competitive pressures may ultimately eliminate the need for segregating codes if the ILECs voluntarily expand their outbound calling scopes. (Cadieux Rebuttal, p. 45).

ILECs should also be expressly required to continue to recognize resold and ported numbers as MCA numbers. (Cadieux Direct, p. 34; Tr. 827-28). While SWBT committed not to make any unilateral changes in this policy, its continuing interference with CLEC participation in the MCA Plan requires an express PSC order. (Tr. 1018-19).

A simple verified notification process is clearly workable and preferable to any other more cumbersome and burdensome administrative process.

f. What is the appropriate inter-company compensation between LECS providing MCA services?

The Commission should continue to allow adjoining LECs, whether CLEC or ILEC, to cooperatively provide MCA service on a bill-and-keep basis in accordance with the existing MCA Plan.²² The Commission should also continue to respect the reciprocal compensation provisions of existing interconnection agreements between CLECs and ILECs operating in the same exchanges. The clear distinction between the relationship of neighboring LECs versus the relationship between competing LECs warrants such separate compensation programs. (Cadieux Rebuttal, p. 38-39; 42-43; Surrebuttal p. 18; see also Hughes, Tr. 1007).

Regarding adjoining LECs, whether CLEC or ILEC, there is no reason to alter the existing bill-and-keep provisions of the MCA Plan.²³ It does not appear that any party proposes

²² Existing use of bill-and-keep by outer tier ILECs sending traffic to CLECs was acknowledged at the hearing. (Stowell, Tr. 367).

such an alteration. In particular, the ILECs that adjoin the certificated service areas of the CLECs support continued bill-and-keep relationships with adjoining CLECs and ILECs. (Stowell, Tr. 376, 400; Matzdorff, Tr. 1191-92; Evans, Tr. 1125-26).²⁴

The Commission has rejected previous proposals to charge access for termination of local traffic, such as in the ATT/SWBT arbitration and the recent Alma access tariff case.²⁵ It would be unlawfully discriminatory for outer tier ILECs to continue bill-and-keep relationships with SWBT (the inner tier ILEC), yet impose access charges on CLECs operating in SWBT's service areas. See Section 392.200 R.S.Mo. (Cadieux Direct, p. 44-47). Furthermore, such discriminatory imposition of access charges would impair the ability of CLECs to compete, because they would either have to offer smaller calling scopes than SWBT to avoid the access charges or charge unnecessarily high rates to cover the additional cost of the access charges. Mr. Cadieux explained the problem with discriminatory imposition of access charges in his direct testimony.

A. This is probably best explained by way of example: Assume SWBT serves customer A in an office building in downtown St. Louis and a CLEC serves customer B located in an adjacent office in the same building. If SWBT's customer A makes a call to an MCA subscriber served by an Independent LEC in MCA-5, SWBT does not pay the Independent LEC for transport and termination of that call because bill and keep is the applicable compensation mechanism pursuant to the Commission's 1992 MCA decision. If, however, the Independent LEC is permitted, for example, to assess its intrastate access charges to the CLEC for transport and termination of an identical call from customer B to the same called party, in my opinion an unreasonably discriminatory situation has been created – SWBT's traffic would be provided an unreasonable

²³ While it is possible that in the future adjoining carriers may negotiate other arrangements and present them to the Commission for approval, no carriers have done so to date and the issue is not ripe for consideration.

²⁴ In response to Commissioner Drainer's question at Tr. 1145, because the parties agree, the Commission does not have jurisdiction to compel a different result under Section 392.240.3, nor does Section 252 of the Telecommunications Act authorize the Commission to commence interconnection agreement arbitration proceedings independent of a request from a carrier.

²⁵ 5 MoPSC 3d 274 and Case No. TT-99-428.

preference over the CLEC's traffic in terms of the Independent LEC's transport and termination. In either case, the Independent LEC is providing the exact same service (MCA traffic termination) with no difference in cost to the Independent LEC. Yet the CLEC could be charged in the range of 3 to 5 cents per minute (depending on the level of the particular Independent incumbent LEC's access charges) while SWBT would pay nothing to the Independent LEC for the same transport and termination service.

Q. What effect would an unreasonably discriminatory inter-company compensation system have on CLECs?

A. It would produce an economic disincentive to CLECs which otherwise may be predisposed to establish MCA -wide local calling scopes.

Q. Please explain.

A. On the one hand, a CLEC would find it difficult from an economic standpoint to justify foregoing toll revenues from its end-user by including these calls within its local calling scope if it is going to be assessed intrastate access charges for termination of those minutes. On the other hand, excluding the Independent incumbent LEC MCA territory from its local calling scope is not a good solution, since that approach would put the CLEC in a situation of having a smaller local calling scope than SWBT. As a new entrant in the local exchange market, if a CLEC is forced to offer a smaller local calling scope than the incumbent LEC, the CLEC would be placed at a competitive disadvantage as a result of an unreasonable preference granted to the incumbent LEC.

(Cadieux Direct, p. 44-46). CLECs would not even be able to charge the adjoining ILECs reciprocal access rates, because they would still have to price access at SWBT's rates and could not match the higher outer tiers ILEC access rates. See Report and Order, Case No. TO-99-596 (June 1, 2000). (Cadieux Direct, p. 46). Such a non-reciprocal arrangement would violate the ILECs duties under Section 251(b)(5) of the Act regarding reciprocal compensation between adjoining LECs operating within the same local calling area. See 47 CFR 51.701.²⁶ Hence the adjoining ILECs would face significant access rate decreases to eliminate reciprocity issues and

²⁶ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, ¶ 1037 (Aug. 8, 1996).

face significant pressure to increase MCA rates to cover CLEC access charges. (Evans, Tr. 1137-39).

Continued implementation of the bill-and-keep methodology between adjoining LECs would not only avoid unlawful discrimination and non-reciprocal charges, but it would also be beneficial because the outer tier ILECs would not have to develop a means of differentiating between SWBT and CLEC MCA traffic, most of which will be carried over the same SWBT facilities. (Cadieux Direct, p. 43, 47). Further, given the size of the rural LECs' exchanges and related traffic volumes (Tr. 377), the status quo of bill-and-keep prevents market entry delays and eliminates the need for unproductive and inconsequential multiple negotiations. (Dale Rebuttal, p. 4).

Regarding CLECs and ILECs that are directly interconnected head-to-head competitors, such companies should continue to be bound by the reciprocal compensation provisions of their approved interconnection agreements. The Commission has expressly approved interconnection agreements that establish reciprocal compensation rates for all local traffic, including MCA traffic. When asked to arbitrate the issue in the AT&T/SWBT proceeding, the Commission determined that such reciprocal compensation rates should apply to traffic throughout the MCA area, including both mandatory and optional areas. Other companies including Gabriel have adopted those provisions, which encourage correspondingly large CLEC local calling scopes. (Cadieux Direct, p. 42-43, citing Arbitration Order, Case No. TO-97-40, issued December 11, 1996, p. 41). Other agreements, containing similar provisions, have been established and adopted by other CLECs. (Hughes, Tr. 1006-07).

These agreements also provide for reciprocal transit charges for traffic exchanged between adjoining LECs through a transiting carrier operating in the same territory as the originating carrier. (Cadieux Direct, p. 46).²⁷

Regarding the questions Commissioner Drainer raised at the hearing (Tr. 490), the Commission does not have the authority to alter the reciprocal compensation provisions of existing interconnection agreements, particularly in a generic proceeding such as this case. Interconnection agreements are negotiated, arbitrated, submitted, and approved pursuant to Section 252 of the Telecommunications Act of 1996. The Commission's authority regarding such contracts arises from the Act. The Act does not provide authority for state commissions to alter reciprocal compensation provisions of approved agreements prior to contract expiration. Any attempt at such an alteration would violate the Act.

While the FCC and state commissions may identify additional duties between interconnecting carriers to be added to existing agreements, such as has happened in the areas of collocation and unbundling of additional network elements, and may identify specific negotiated provisions that are unlawful, such authority does not extend to the alteration of existing lawful approved reciprocal compensation provisions.

In particular, given that the Commission has arbitrated and approved these reciprocal compensation provisions, it is constrained by its orders and cannot change them in a collateral generic proceeding such as this case. See Section 386.550 R.S.Mo.

It is important that the Commission understand that a ruling purporting to exempt MCA traffic from the reciprocal compensation provisions of existing agreements would

²⁷ Transit charges do not, and should not, apply in the context of bill-and-keep arrangements. The addition of such charges now would simply create windfall revenues for SWBT. (Hughes, Tr. 985-87).

essentially eradicate those provisions, because MCA traffic is the vast majority of local traffic. (Voight, Tr. 211).

Not only should the Commission refrain from interfering with existing reciprocal compensation provisions, but it should also refrain from pre-judging future interconnection cases by making any non-binding pronouncement of future policy regarding such matters in this case. If the Commission desires to establish uniform reciprocal compensation provisions for local traffic exchanged between interconnecting carriers, it should establish a case for that purpose and provide adequate notice to all affected carriers. The present proceeding is an inappropriate vehicle to accomplish such a purpose and adequate industry notice has not been provided.²⁸

Moreover, the FCC's interconnection rules strictly limit a state commission's authority to impose bill and keep as the reciprocal compensation arrangement between two interconnecting carriers. 47 C.F.R. 51.713(b) provides, in part, that a state commission must first determine "that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so..." before it can impose bill and keep as the reciprocal compensation arrangement between two interconnecting carriers. No such showing has been made in this case. While subsection (c) of the rule provides that a state commission is not precluded from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, parties have a right to rebut such a presumption and a state commission is precluded from imposing bill and keep where the presumption is

²⁸ Even if the Commission commenced such a proceeding, it would still face significant limitations under Section 252 of the Act on its ability to disapprove negotiated agreements that did not incorporate the results of such a proceeding.

successfully rebutted. At this point, no such presumption has been made by the Commission with respect to any two particular interconnecting carriers (and the record in this case provides no support for any such presumption) and, consequently, the right to rebut that presumption has not been triggered. Thus, a Commission ruling in this case that would purport to modify the reciprocal compensation provisions of an existing interconnection agreement would violate the FCC's reciprocal compensation rules.

There is nothing unfair or improper about continued application and enforcement of the reciprocal compensation provisions of existing interconnection agreements. First, because such compensation is reciprocal, the parties to the agreements are compensated for the costs they incur in transporting and terminating each other's local traffic. (Cadieux Rebuttal, p. 21-23, 40-41). Second, Section 251(b)(5) of the Act and 47 CFR 51.701 et seq. require reciprocal compensation for the transport and termination of local traffic, when traffic flows are not in balance, unless the parties mutually agree to a bill-and-keep methodology. The Commission has determined that traffic within the MCA areas is local in the AT&T/SWBT arbitration and Gabriel has adopted the resulting interconnection agreement. See Arbitration Order, p. 41, Case No. TO-97-40 (December 11, 1996); Arbitration Order Regarding Motions for Clarification, p. 9 and Attachment B pages 18-22 (October 2, 1997). (Cadieux Rebuttal, p. 23-24, 26, 39-41).

SWBT appears to be the only ILEC confronted by head-to-head competition that opposes continued adherence to existing interconnection agreements. (Evans, Tr. 1126-29). Yet, when CLECs proposed bill-and-keep arrangements in arbitrations and negotiations, SWBT opposed them. (Cadieux Rebuttal, p. 24-27, 41-42; Hughes, Tr. 1007-08; Kohly, Tr. 508). Now that CLECs have agreements and business plans in place, the Commission should reject SWBT's efforts to switch gears. (Dale Rebuttal, p. 4-5). The motives behind SWBT's change in position

remain undisclosed (Cadieux Rebuttal, p. 42), and are suspect in any event, given that a change to bill-and-keep would conveniently limit its exposure in pending reciprocal compensation complaint cases. The Commission cannot and should not allow SWBT to accomplish its ulterior goals by overriding existing reciprocal compensation contract provisions.

In conclusion, the Commission should not attempt to revise the existing bill-and-keep relationships between LECs operating in adjoining service areas, both CLECs and ILECs, nor should it attempt to revise existing reciprocal compensation provisions of interconnection agreements between CLECs and ILECs operating within the same service areas.

g. Is the compensation sought in the proposed MOU appropriate?

The Commission should prohibit any company, including SWBT, from charging or receiving SWBT's proposed "MOU" compensation. SWBT's proposed "MOU" compensation is an improper "competitive loss surcharge" and "dialing parity surcharge". SWBT is already fully compensated through its retail rates and interconnection agreements and such additional unilateral charges for fulfilling its legal obligations are unjustified and unlawful. Such charges violate the dialing parity, interconnection, reciprocal compensation, and free market entry provisions of the Telecommunications Act, as well as related rules and decisions of the FCC and this Commission (such as the reciprocal compensation provisions in the approved ATT/SWBT interconnection agreement that Gabriel adopted). Such charges impede the development of local competition in the outer MCA zones by penalizing a CLEC for winning over a customer and by requiring the CLEC to pay more to SWBT than SWBT pays the CLEC for the use of the involved terminating facilities, when the CLEC should not have to pay anything.

The MOU was clearly forced upon Intermedia by SWBT under exigent circumstances. It is not an appropriate agreement, either in purpose or content. It was not even submitted for approval as required by Section 252 of the Telecommunications Act. (Cadieux Direct, p. 15-26; Dale Surrebuttal, p. 8).

The MOU surcharge is an improper competitive loss surcharge. Through the surcharge, SWBT seeks to recover at least in part the revenues it loses when one of its customers decides to switch to a competitor. SWBT would have CLECs pay 2.6¢ per minute to cover SWBT's competitive losses. (Cadieux Direct, p. 18, Rebuttal, p. 29). Yet, SWBT admits it is not entitled to recover competitive losses. (Hughes, Tr. 1025).

The MOU surcharge is also an illegal dialing parity surcharge. SWBT seeks to extract such payments by holding MCA traffic hostage through its illegal screening and blocking practices (see issue a. above). SWBT has an obligation to provide dialing parity without regard to the identity of the called party's provider. See Sections 3(a)(2)(39) and 251(a)(3) of the Telecommunications Act; 47 CFR 51.205-215. In particular, 47 CFR 51.207 provides:

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider. (Emphasis added).

SWBT has no right to levy an additional charge upon CLECs as a condition of fulfilling its legal obligation to provide dialing parity. (Cadieux Direct, p. 19, 25).

The surcharge also constitutes an unreasonable rate, term and condition that SWBT seeks to place on CLECs for interconnection, in violation of Section 251(a)(D) of the Act.

Further, the surcharge would override and subvert the approved reciprocal compensation process required by Sections 251(b)(5) and 252(d)(2) of the Act and embodied in

existing PSC-approved interconnection agreements such as Gabriel's agreement with SWBT (adopted from the AT&T agreement). Mr. Cadieux explained:

When SWBT's competitive loss surcharge is superimposed over the interconnection agreements' reciprocal compensation mechanism, the following occurs on the call from the SWBT customer in an inner MCA zone to a competitor's customer in an outer MCA zone: The CLEC bills SWBT the \$.005 per minute Commission-approved charge for providing the termination function on the call, but at the same time is charged 2.6 cents per minute by SWBT on that call – in other words, the CLEC actually pays SWBT a net of 2.1 cents per minute on a call even though it is the CLEC that is providing the termination function. This turns reciprocal compensation on its head – instead of being compensated for providing the termination function, the CLEC is forced to pay SWBT, and pay at a rate five times that of the local reciprocal compensation rate approved by the Commission. I would call this “inverse compensation”. Additionally SWBT would apply this inverse compensation only on its competitors, not to itself, making it one-way, inverse compensation. In my opinion, it is difficult to imagine a scheme which would violate the FTA's reciprocal compensation requirements in a more fundamental manner than what SWBT is attempting through this surcharge.

(Cadieux Direct, p. 29). Such non-reciprocal “inverse” compensation is not lawful under the Act.

The surcharge also would violate the prohibition against barriers to competitive entry of Section 253 of the Act. Such a charge would artificially inflate competitors' costs and substantially deter facilities-based local competition in the outer zones of the MCA. It would also effectively preclude competitors from offering MCA service, in violation of Section 253.

Mr. Cadieux explained the significant negative implications of the surcharge in his direct testimony:

Both the toll and local markets have been open to competition as a matter of law since 1996. As a result, SWBT has no entitlement to be insured against competitive losses in those markets – i.e., it no longer has monopoly entitlement in those markets. Such an entitlement would thwart a principal beneficial effect of competition – it would thwart the incentives created on carriers by the competitive marketplace incentive to provide service

at the lowest reasonable cost and in the most efficient manner, and would artificially increase the cost of doing business for SWBT's competitors. Moreover, the particular type of charge at issue here – one which is levied directly on the marketplace participant which has convinced the customer to switch to its service – is especially pernicious, since it penalizes the competitive carrier for succeeding in the marketplace. The anti-competitive effect of the surcharge is compounded by the fact that it is not reciprocal – i.e., under the interim arrangement SWBT assesses the surcharge to the CLEC as a condition of SWBT processing inner zone to outer zone MCA calls on a local-dialed-and-billed basis, but it does not contemplate the CLEC imposing the surcharge on SWBT for calls originated for the same call when originated by a CLEC customer and terminating to an SWBT customer.

(Cadieux Direct, p. 20-21). While SWBT attempted to minimize the negative impacts of its illegal surcharge by suggesting that it might become reciprocal or become subject to a cap, even if such “adjustments” were realistic (which is extremely doubtful in the case of reciprocity), the surcharge would remain improper and illegal. (Cadieux Rebuttal, p. 30-34, Surrebuttal, p. 25; Dale Surrebuttal, p. 4).

Mr. Cadieux also demonstrated that SWBT's illegal surcharge is just the latest act in SWBT's long-running play to preserve its local monopoly. SWBT has previously sought to impose access charges on CLEC MCA traffic. Now it seeks to impose its dialing parity surcharge. SWBT will apparently try anything to increase CLEC expenses and thereby fend off price competition. (Cadieux Direct, p. 23).

SWBT unsuccessfully attempts to justify its proposed surcharge by claiming that it is the price that CLECs must pay to participate in the MCA Plan. But CLECs need not purchase an admission ticket from SWBT. The Commission can and should direct all LECs to cooperate and provide the MCA calling plan, and all LECs including SWBT should comply. (Voight, Tr. 180). SWBT admits that the Commission can order it to provide toll-free calling. (Hughes, Tr. 1029). SWBT simply needs to comply with the Plan. (Cadieux Rebuttal, p. 9-12).

SWBT also falsely alleges that it would be unfair for SWBT to have to pay reciprocal compensation for MCA calls to CLEC customers unless it receives the surcharge compensation in return. (Unruh Direct, p.10-11; Hughes Direct, p. 9). First, the record reflects that SWBT actually gained revenues at the inception of MCA service. (Hughes, Tr. 1001-02; Exhibit 45 (Substitute) Appendix A3). Second, even if SWBT's MCA revenues had been designed to recover toll revenues lost at the inception of the Plan, such action occurred in an monopoly environment, from the Commission's mandate that toll service be converted into local. Now there is suppose to be a competitive market, and the Commission is not converting toll into local, but rather making sure that local customers can freely choose their providers. There is nothing unfair about a monopoly provider losing customers, and accompanying revenues, to competitors. That is what is supposed to happen.²⁹

h. Should the MCA Plan be retained as is, modified (such as Staff's MCA-2 proposal) or eliminated?

It appears that all parties agree that the MCA Plan should be retained and should not be eliminated. It also appears that all parties agree that any modifications to the MCA Plan such as Staff's MCA-2 proposal should be considered later. To the extent any action by the Commission to address ILEC obstruction of CLEC participation in the Plan is construed as a modification, such modifications should be made immediately. (Cadieux Direct, p. 47-48; Rebuttal, p. 45-56; Dale Rebuttal, p. 10-11).

²⁹ Likewise, from the moment a CLEC signs up its first customer, it is at risk of losing customers and the accompanying revenues to another provider. CLECs do not deserve compensation from the winning carrier any more than SWBT does. (Cadieux Rebuttal, p. 19, 30).

i. If the current MCA Plan is modified, are ILECs entitled to revenue neutrality? If so, what are the components of revenue neutrality and what rate design should be adopted to provide for revenue neutrality?

If the Commission makes structural changes in a subsequent case, such as those proposed by Staff, then such an inquiry may be in order. However, price cap companies must abide by the statute governing their voluntary selection of such regulation. Further, no company is entitled to protection from competitive losses under the guise of "revenue neutrality", whether by means of SWBT's proposed MOU surcharge or otherwise. No revenue neutrality mechanism should involve recovery from competitors.

It appears that all parties agree that SWBT and the other ILECs are not entitled to recover competitive losses. (Cadieux Surrebuttal, p. 20-21; Hughes Tr. 1025; Voight, Tr. 193). However, that is the only type of loss to be sustained by the ILECs upon full competitive entry by CLECs into the MCA Plan. Hence, there is no need or justification for any type of revenue neutrality analysis or true-up process in conjunction with the resolution of the issues in the case. (Evans, GTE, Tr. 1162-63).

Even SWBT ultimately conceded the point through Mr. Unruh, who testified at the hearing as follows:

Q. Do you believe that there needs to be a true-up of some sort with regard to the MCA subscribers?

A. With respect to ..

Q. With respect to ..

A. -- going back to the implementation from 92-306?

Q. Yes.

A. No, I don't believe so. The revenue neutrality that would have taken place at that point in time is basically a snapshot of what exists pre-plan and what exists post-plan. You adjust to try to make that revenue neutral, and then what happens going forward I don't believe is relevant.

(Tr. 1111) (Emphasis Added). Despite SWBT's other, less straightforward testimony, it is not entitled to any form of revenue recovery in this case.

As Mr. Cadieux explained, SWBT's efforts to portray its MCA surcharge as some type of revenue neutrality mechanism, rather than the competitive loss recovery mechanism that it really is, cannot withstand scrutiny. Mr. Cadieux testified:

Mr. Hughes' contention that the MCA Surcharge does not constitute revenue recovery for a competitive loss is purely fictitious. The event which triggers SWBT's imposition of the MCA Surcharge is an outer MCA zone customer's decision to switch its dial-tone service from SWBT to a facility-based CLEC – i.e., a competitive loss to SWBT. When the customer makes that decision, SWBT loses the revenue that customer had previously been paying SWBT – the prevailing local exchange rate, including any applicable MCA additive. For purposes of illustration, assume a particular outer MCA zone business customer is paying a \$35 per month local exchange rate and a \$50 per month MCA additive, for a total of \$85 per month. When that customer decides to switch dial-tone service to a facilities-based CLEC, SWBT loses the \$85 per month in revenue. That is a competitive loss. That is the event that triggers SWBT's imposition of the MCA Surcharge. When this competitive loss occurs, SWBT's proposition to the CLEC is, “pay me 2.6 cents per minute for all calls from SWBT inner MCA zone customers to your outer MCA zone customer, or we will impose MCA Screening.” (Of course, for reasons I and other CLEC witnesses have described in previous testimonies, if SWBT is able to successfully continue MCA Screening, it will be extremely difficult for the CLEC to retain that outer MCA zone customer and in most cases the CLEC would be coerced into paying the MCA surcharge.)

There is no lost toll revenue in the scenario I described above – all of the “lost revenue” is local exchange and MCA additive revenue which SWBT was receiving from the outer MCA zone customer. There would only be lost toll to SWBT if the outer MCA zone customer that switches dial-tone service to a CLEC is a local-only (rather than MCA optional) subscriber. In any event, both the local exchange and toll markets are open to

competition, so irrespective of whether particular MCA calls are considered local or toll, and irrespective of how those revenues are recovered currently by SWBT (from the calling party as toll revenue or from the called party in the form of local charges including any MCA additive), the loss of those revenues occasioned by an outer MCA zone customer's decision to switch its dial-tone service from SWBT to a competitor constitutes a competitive loss.

(Cadieux Surrebuttal, p. 22-23). Likewise, on cross-examination, Mr. Hughes was forced to admit that the only loss that occurs when SWBT loses a customer to a CLEC participating fully in the MCA Plan would be a competitive loss. (Tr. 1026-27). Again, he also admitted SWBT is not entitled to recover competitive losses. (Tr. 1025).

In any event, SWBT's proposed MCA surcharge would not be an appropriate means by which to achieve revenue neutrality. As Mr. Cadieux stated:

It is difficult to conjure up a more directly anti-competitive mechanism than one in which the dominant service provider (in this case, SWBT or other incumbent LEC in a service area within an MCA) levies a surcharge on its new entrant competitors to replace revenues lost as a result of a new entrant's success in the market place – i.e. as a result of the new entrant convincing an outer MCA zone customer to select it as the customer's dial-tone service provider.

(Cadieux Surrebuttal, p. 23).

j. Should MCA traffic be tracked and reported, and if so, how?

No tracking and recording is required for adjoining carriers operating on a bill-and-keep basis. Existing reciprocal compensation agreements involve sufficient tracking and reporting requirements.

LECs operating in adjoining service areas and utilizing the bill-and-keep methodology do not currently track and report MCA traffic. (Stowell, Tr. 392, Evans, Tr. 1159). There is no need to start tracking and reporting the traffic now. Tracking and reporting expenses should not be unnecessarily incurred in bill-and-keep situations. Further, no matter what

methodology is used between such adjoining carriers, the requirements should be the same for all carriers and there should be no discrimination between CLECs and ILECs. (Kohly, Tr. 515).

LECs operating in the same service areas are party to interconnection agreements that already address tracking and reporting requirements for reciprocal compensation purposes. The Commission cannot and need not address these provisions in this case. See supra Section f of this Brief. The testimony indicates that the involved parties are in good faith already working out such tracking and reporting requirements and no specific dispute has been presented to the Commission. (Cadieux, Tr. 831-32; Hughes Tr. 994).

While it was not an issue presented on the issues list and, therefore, is not before the Commission for resolution according to the orders issued in this case, there was discussion during the hearings regarding the sufficiency of records being exchanged between adjoining carriers for non-MCA traffic that is subject to access charges, including locally-dialed traffic such as SWBT's Local Plus traffic.³⁰ The access tariffs are in effect and enforceable and do not require attention. (Hughes, Tr. 1040-41). It would be completely inappropriate for ILECs to block access traffic. (Evans, Tr. 1129). As Mr. Evans testified, the ILECs are still working out the various involved reports themselves, following the dissolution of the PTC plan. (Tr. 1142, 1159-62, 1179). All witnesses committed to continuing to develop these record exchanges in good faith. If the Commission has concerns about this issue, it should adhere to its scheduling order and address any such non-MCA traffic issues in a subsequent proceeding. See Order, p. 6 (Nov. 30, 1999). The parties have not had adequate notice and an opportunity to be heard at this point.

³⁰ On the other hand, as the Commission has previously recognized, access charges do not apply to local traffic like MCA traffic, even when three carriers are involved in origination, transit, and termination. See In the matter of Alma Telephone Company's Filing to Revise its Access Service Tariff, Case No. TT-99-428, Report and Order, p. 13 (2000).

Conclusion

From the record in this case it is clear that CLECs must be allowed to fully participate in the MCA Plan. There appears to be no dispute that CLEC participation is appropriate and essential to the delivery of the benefits of this Commission – created calling plan. To ensure CLEC participation, the Commission must prohibit any further interference by SWBT, including screening or blocking of toll-free calling, as well as any further extraction by SWBT of surcharges for CLEC participation in a Commission – designed calling plan.

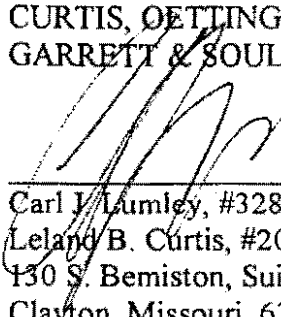
There also is no dispute that CLECs must be allowed to participate in the MCA on a competitive basis, with pricing and out-bound calling scope flexibility. Indeed, lower rates and broader calling scopes have already been approved by the Commission.

The CLECs and adjoining ILECs agree that they should exchange MCA traffic on a bill-and-keep basis, just as neighboring ILECs have always done.

The CLECs understandably want SWBT to abide by its approved interconnection agreements. SWBT wants to use this case as a means of avoiding its reciprocal compensation obligations, but the Commission cannot and should not take such action.

As stated earlier in this Brief, the necessary and proper action plan can be summarized as follows: (I) stop SWBT's anticompetitive MCA screening and surcharge practices (and thereby restore CLECs to their undisputed proper status as full MCA participants); and (II) preserve the status quo regarding the competitive provision of MCA service pursuant to existing certificates, tariffs, interconnection agreements, and bill-and-keep arrangements.

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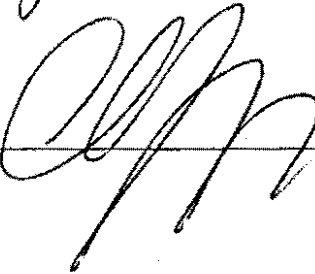


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CERTIFICATE OF SERVICE BY MAIL

A true and correct copy of the foregoing was served upon the parties identified in the attached service list on this 30 day of June, 2000, by placing same in a postage paid envelope and depositing in the U.S. Mail.



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LOCAL EXCHANGE TARIFF
7th Revised Sheet 31
Replacing 6th Revised Sheet 31
and 5th Revised Sheet 30.01

LOCAL EXCHANGE TARIFF

(FC) 1.5 METROPOLITAN EXCHANGE SERVICE - (Continued)

(FC) 1.5.3 St. Louis Metropolitan Exchange - (Continued)

Exchange Areas
Included in Primary Service Area

MCA-2 Zones - (Continued)

All subscribers in the St. Louis Metropolitan Exchange, Manchester, Fenton and Valley Park; plus Optional Metropolitan Calling Area service subscribers in Southwestern Bell's exchanges of Portage Des Sioux, St. Charles, Chesterfield, Maxville, Imperial, Harvester, Pond, Eureka, High Ridge, Antonia, Herculaneum-Fevely, Gray Summit, Pacific, Cedar Hill, Ware, Hillsboro, Festus-Crystal City and DeSoto; GTE Midwest, Incorporated's (GTE's) exchanges of St. Peters, O'Fallen, Dardenne, Winfield, Troy, Old Monroe, Moscow Mills, Wentzville, Foristell, New Melle, Defiance and Augusta; and Orchard Farm Telephone Company's exchange of Orchard Farm.

All subscribers in the St. Louis Metropolitan Exchange, Maxville and Imperial; plus Optional Metropolitan Calling Area service subscribers in Southwestern Bell's exchanges of Portage Des Sioux St. Charles, Chesterfield, Manchester, Valley Park Fenton, Harvester, Pond, Eureka, High Ridge, Antonia, Herculeaneum-Pevely, Gray Summit, Pacific, Cedar Hill, Ware, Hillsboro, Festus-Crystal City and DeSoto; GTE Midwest, Incorporated's (GTE's) exchanges of St. Peters, O'Fallen, Dardenne, Winfield, Troy, Old Monroe, Moscow Mills, Wentzville, Foristell, New Melle, Defiance and Augusta; and Orchard Farm Telephone Company's exchange of Orchard Farm.

Effective: January 11, 1995

Appendix A