

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY**

**May 1, 2001**

**CASE NO: TO-2000-667**

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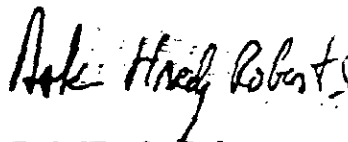
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**Enclosed find certified copy of a REPORT AND ORDER in the above-numbered case(s).**

**Sincerely,**



**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



In the Matter of the Investigation into the )  
Effective Availability for Resale of South- )  
western Bell Telephone Company's Local Plus )  
Service by Interexchange Companies and )  
Facilities-Based Competitive Local Exchange )  
Companies )

Case No. TO-2000-667

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**REPORT AND ORDER**

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**Issue Date: May 1, 2001**

**Effective Date: May 11, 2001**

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF MISSOURI**

In the Matter of the Investigation into the    )  
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Service by Interexchange Companies and        )  
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Companies                                        )

Case No. TO-2000-667

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For: The Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE:      **Morris L. Woodruff**

## **REPORT AND ORDER**

### **Procedural History**

The Commission created this case to investigate the effective availability for resale of Southwestern Bell Telephone Company's (SWBT's) Local Plus service by interexchange carriers (IXCs) and facilities-based competitive local exchange companies (CLECs). The Commission issued an order on April 20, 2000, making SWBT a party and directing that notice be sent to all telecommunications companies in the state of Missouri. Any party wishing to intervene was directed to file an application no later than May 10, 2000.

Timely applications to intervene were received from The Missouri Independent Telephone Company Group of Local Exchange Companies (MITG),<sup>1</sup> The Small Telephone Company Group (STCG),<sup>2</sup> and AT&T Communications of the Southwest, Inc. (AT&T). The Commission issued an order on May 24, 2000,

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<sup>1</sup> The MITG includes the following members: Alma; Chariton Valley; Choctaw; Mid-Missouri; Modern; MoKan Dial; and Northeast Missouri Telephone Companies.

<sup>2</sup> The STCG includes the following members: BPS Telephone Company; Cass County Telephone Company; Citizens Telephone Company; Craw-Kan Telephone Cooperative, Inc.; Ellington Telephone Company; Farber Telephone Company; Fidelity Telephone Company; Goodman Telephone Company, Inc.; Granby Telephone Company; Grand River Mutual Telephone Corporation; Green Hills Telephone Corporation; Holway Telephone Company; Iamo Telephone Company; Kingdom Telephone Company; KLM Telephone Company; Lathrop Telephone Company; Le-Ru Telephone Company; McDonald County Telephone Company; Mark Twain Rural Telephone Company; Miller Telephone Company; New Florence Telephone Company; New London Telephone Company; Orchard Farm Telephone Company; Oregon Farmers Mutual Telephone Company; Ozark Telephone Company; Peace Valley Telephone Company; Rock Port Telephone Company; Seneca Telephone Company; Steelville Telephone Exchange, Inc.; and Stoutland Telephone Company.

permitting intervention by MITG, STCG and AT&T. On June 22, 2000, ALLTEL Communications, Inc., (ALLTEL) filed an Application to Intervene Out of Time for Good Cause.

A prehearing conference was held on June 27, 2000, at which SWBT, MITG, STCG, ALLTEL, and the Staff of the Commission (Staff) appeared and participated. On June 28, the Commission issued an order granting ALLTEL's application to intervene.

In its June 28th order, the Commission also directed the parties to file, no later than July 7, written suggestions regarding any limitations that the Commission should place on the issues to be addressed in this case. In their applications to intervene, MITG and STCG indicated that they wished to raise issues regarding payment of terminating compensation, traffic routing and record exchange. These issues appeared to be beyond the range of issues contemplated by the Commission when the case was created. After considering suggestions from the parties, as well as the responses of the parties to those suggestions, the Commission, on August 22, 2000, issued an order recognizing the issues raised by MITG and STCG and declining to act to limit the issues to be considered.

On September 7, 2000, the Commission established a procedural schedule that directed the parties to file direct, rebuttal and surrebuttal testimony and set this case for evidentiary hearing on January 10, 11 and 12, 2001. On October 19, 2000, AT&T notified the Commission that it was withdrawing from participation in this case. A hearing was held on January 10 and 11, 2001. The parties submitted initial briefs on March 23, 2001, and reply briefs on April 6, 2001.

## Discussion

SWBT takes the position that it has made its Local Plus service fully available for resale by IXCs and CLECs. It points to the fact that 16 CLECs in Missouri are currently reselling Local Plus as proof that Local Plus is available for resale. SWBT further contends that although no IXC is currently reselling Local Plus, appropriate systems are in place for them to resell that service if they choose to do so. Finally, SWBT concedes that no CLEC has sought to provide Local Plus in Missouri through unbundled network elements (UNEs); but SWBT indicates that it is willing to provide the necessary switching facilities, as an UNE, to any CLEC that wants to provide a Local Plus type service. SWBT, however, contends that it need not, and indeed cannot, permit a CLEC that provides services to a customer through UNEs or through its own facilities to resell SWBT's Local Plus service to that customer.

ALLTEL, which is a facilities based CLEC, argued that it must be permitted to resell Local Plus to its customers that it serves through its own facilities. ALLTEL asserts that if it is not permitted to resell Local Plus under those circumstances it will be placed at a severe competitive disadvantage.

The small telephone companies that are members of the STCG and the MITG are not themselves seeking to resell Local Plus. They are, rather, incumbent local exchange carriers serving their own exchanges. They support the ability of CLECs providing services through UNEs or through their own facilities to resell Local Plus because they are concerned about obtaining payment of terminating access charges for Local Plus calls terminating in their exchanges. For Local Plus calls, even those resold by a reseller CLEC, SWBT pays the terminating access

charges. If UNE providers are not permitted to resell Local Plus and instead must provide their own Local Plus type service, the small telephone companies are concerned that they might not be paid terminating access for Local Plus type calls coming from those CLECs.

Staff and the Office of the Public Counsel (Public Counsel) contend that SWBT should be required to permit CLECs providing service through UNES or through their own facilities to resell its Local Plus service. However, Staff would require the CLEC reselling Local Plus in those circumstances to pay terminating access to third party LECs.

### **Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The parties identified several issues for resolution by the Commission. Each of those issues will be addressed in turn.

**1) Is SWBT properly making Local Plus service available for resale to IXC's and CLECs?**

SWBT's Local Plus service is an optional, calling plan available to single-party residential and business customers. For a fixed monthly rate, subscribers to Local Plus can make unlimited calls to all numbers within the Local Access and Transportation Area (LATA). The Commission

has described Local Plus as a hybrid service because it has characteristics of both local and toll.

Local Plus is like toll in that, as a general rule, all Local Plus calls would be classified as intraLATA toll, except for the fact that the customer subscribes to Local Plus. In recognition of their toll characteristics, the Commission has ordered that Local Plus calls require payment of terminating access compensation, rather than application of reciprocal compensation arrangements as for local calls.

Local Plus is like local in that it is offered on a flat rate, rather than on a measured, per-minute-of-use rate. Furthermore, the dialing pattern used for local plus calls is the same as that used for local calls. In other words, the Local Plus customer does not need to dial a 1 in order to complete the call. For purposes of network transport, Local Plus calls are handled on the Feature Group C network, also known as the LEC to LEC network, rather than the Feature Group D network, which is used for interexchange, toll traffic.

Local Plus was intended as a substitute for Community Optional Service, an earlier service that permitted flat-rate extended local calling. A great deal of public dissatisfaction resulted when Community Optional Service was eliminated, but Local Plus proved to be a popular and valued replacement. Certainly the Commission and the public want to see that service continued.

When the Commission set out the conditions under which SWBT would be permitted to offer Local Plus, it recognized that Local Plus was a unique hybrid service and imposed certain requirements on SWBT. The companies that sought to serve local phone customers in competition with SWBT were concerned that SWBT would offer Local Plus at a rate below its actual costs, particularly with regard to the imputed cost of terminating



access, thus making it impossible for other carriers to effectively compete with SWBT. The Commission chose not to attempt to impute access charges on the cost of provisioning of Local Plus. Instead the Commission found that imputation of access charges would not be necessary if this type of service was made available for resale at a wholesale discount to CLECs and IXCs. Specifically, the Commission found that "[I]n order to enable customers to obtain this type of service by using the same dialing pattern, the dialing pattern functionality should be made available for purchase to IXCs and CLECs on both a resale and unbundled network element basis".<sup>3</sup> If SWBT were required to make Local Plus freely available for resale the risk that predatory pricing would endanger competition would be reduced.

No party disputes that SWBT has made Local Plus freely available for resale by CLEC's that want to simply resell the Local Plus service. At the time of the hearing 16 CLECs were reselling Local Plus. SWBT, however, limits resale to CLECs or IXCs that are operating as pure resellers. SWBT denies that it has an obligation to permit resale of Local Plus by CLECs or IXCs that provide service to a customer through the purchase of UNE's or through the provider's separate facilities. Indeed, SWBT argues that "resale" is by definition impossible in such a situation.

SWBT bases its argument on the distinction made in the Telecommunications Act of 1996 between resale of services and provision of service through UNEs or separate facilities. SWBT suggests that, by definition, a company providing certain services through purchase of

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<sup>3</sup> In the Matter of Southwestern Bell Telephone Company's Tariff Revisions Designed to Introduce a LATA-wide Extended Area Service (EAS) Called Local Plus, and a One-Way COS Plan., Case No. TT-98-351, Report and Order issued September 17, 1998, at 39-40.

UNE's, or through its own facilities, cannot also resell those services. Of course, such distinctions do exist, but they are not particularly relevant in this situation.

The Commission is not concerned with placing particular services and providers within a particular box. Instead, the Commission wants to assure that Local Plus is made available to Missouri consumers, without stifling competition for the local telephone market. Local Plus is a very popular service for SWBT. It also has the potential to be a powerful tool to prevent SWBT's competitors from offering this service in the basic local telephone market.

Local Plus has the potential to stifle competition because of SWBT's dominant position in the marketplace. SWBT serves many customers in many exchanges. As a result there is a very good possibility that a SWBT customer who subscribes to Local Plus will place a Local Plus call that terminates with another SWBT customer. SWBT is not required to pay terminating access charges when it terminates a call to itself. Furthermore, the Commission has not required SWBT to pass an imputation test to determine whether the cost of such terminating access charges are covered by the rate it charges for Local Plus service. Of course, a competing local service provider also would not have to pay terminating access to itself if one of its customers places a call to another of its customers using a service similar to Local Plus. However, the chance that a customer of a company with relatively few customers will choose to call another customer of that company is relatively small.

Because it does not have to pay terminating access on a larger percentage of Local Plus calls than would any of its potential competitors, SWBT can potentially price its Local Plus service at a level that cannot be matched by its competitors; and potentially lower than its

actual cost of providing that service. For that reason the Commission, in Case No. TT-98-351, required SWBT to make Local Plus available for resale by its competitors. If Local Plus can be resold by SWBT's competitors at an appropriate wholesale discount, the risk of anti-competitive effects from Local Plus is eliminated.

SWBT's position of allowing resale only by pure resellers would result in Local Plus potentially being used as an anti-competitive barrier for SWBT's UNE and facility-based competitors. SWBT suggests that UNE and facility-based competitors could avoid having to pay terminating access charges by simply choosing not to provide service to a particular customer desiring a Local Plus type service through its own facilities and instead purely reselling Local Plus. However, if a competitor were required to make such a choice, it would discourage competitors from making the capital investments needed to become UNE or facility-based competitors. As previously stated the Commission intended to foster, not discourage, competition when it approved SWBT's tariff to provide Local Plus. Therefore, the Commission will clearly state that if SWBT wants to provide Local Plus service without meeting an imputation test, it must resell that service to all its competitors, including those competitors who provide service to a customer through the use of UNEs or separate facilities.

2) Who should be responsible for paying terminating access charges to third party LECs when:

a) Local Plus is being offered through pure resale of SWBT's retail Local Plus Offering?

All the parties agree that when SWBT resells Local Plus to a pure reseller CLEC it is responsible for paying terminating access charges to

third party LECs. It is presumed that SWBT took this factor into account when it established the price that it charges its customers for Local Plus. SWBT is compensated for these costs when the reselling company pays SWBT the discounted wholesale rate for the Local Plus service.

**b) Local Plus is being offered through a facility-based carrier's purchase of unbundled switching from SWBT?**

If a competing carrier purchases switching from SWBT as a UNE, it can choose to configure that switch in such a way as to provide a competing calling plan that would be similar to Local Plus as offered by SWBT. If a competing carrier were to choose to offer such a calling plan, it would, of course, be responsible for paying terminating access to third party LECs as well as to SWBT when those Local Plus type calls are terminated by those other companies.

The situation is different, however, when the competing telephone company chooses to resell Local Plus rather than create its own calling plan. In that circumstance SWBT is responsible for paying terminating access to third party LECs in the same way that it pays those costs in a pure resale situation. That result is not unfair to SWBT because it will be paid the discounted wholesale rate for Local Plus service by the competing telecommunications company. Again, it is presumed that the rate SWBT charges its customers for Local Plus service will cover the costs of providing that service, including payment of terminating access. Therefore, the wholesale rate, discounted for marketing costs, should be sufficient to compensate SWBT.

**c) Local Plus is being offered through a facility-based carrier's own switch?**

When a facility-based carrier proposes to resell Local Plus utilizing its own switch, it seems at first glance that such a plan is neither reasonable nor feasible. A facility-based carrier, using its own switch, might serve its customer with no connection whatsoever with SWBT. It could certainly establish its own Local Plus type service. A customer of such a service could phone a customer served by a third party LEC or by the facility-based carrier itself and SWBT might never touch the call. In that circumstance it would seem to be unfair to require SWBT to pay the terminating access charges on such a call.

However, the facility-based carrier utilizing its own switch is still facing the same competitive disadvantage that is suffered by the UNE based provider that purchases a switch from SWBT. It still cannot effectively compete with SWBT because of SWBT's ability to avoid paying terminating access charges due to its large number of customers. As previously indicated, if SWBT resells Local Plus it is obligated to pay the terminating access charges that result from the use of that service. If the facility-based carrier is allowed to resell SWBT's local plus service then the competitive disadvantage disappears. Again, as determined for the UNE based provider, the rate SWBT charges its customers for Local Plus service is presumed to cover the costs of providing that service, including payment of terminating access. Therefore, the wholesale rate, discounted for marketing costs, should be sufficient to compensate SWBT.

The facility-based carrier utilizing its own switch does have one difficulty that is not faced by a UNE based carrier; how to get the call from its switch into SWBT's switch to be completed as a Local Plus call? SWBT initially argued that such a maneuver is not technically possible. However, Martin Detling, witness for ALLTEL, a company that wants to

resell Local Plus while utilizing its own switch, explained that ALLTEL's switch could initially process the call from ALLTEL's customer, determine that it was a Local Plus call and then route the call to SWBT's switch, to be sent by SWBT to its destination over the Feature Group C network. SWBT did not argue that this arrangement would be technically impossible; but did contend that such an arrangement would be unfair to SWBT because it would depend upon ALLTEL's correctly identifying the calls that it sends to SWBT as Local Plus calls. If ALLTEL were less than honest, it could misidentify non-Local Plus calls and send them over the connection, requiring SWBT to pay the terminating access charge. SWBT indicated that it would have no way to determine that it was being cheated. SWBT also asserted that any such connection would require an amendment to its interconnection agreement with the facility-based carrier.

The Commission concludes that the ability of a facility-based provider to resell Local Plus using its own switch is vital to that provider's ability to compete with SWBT. The interconnection needed to make such resale possible is technically feasible and it should be possible for the parties to establish the necessary business relationship to share the billing information required to make that interconnection work. The details of such interconnection are the proper subject for negotiation between SWBT and any company seeking to resell Local Plus while utilizing its own switch. Therefore, the Commission will not, in this order, attempt to establish the details of such interconnection.

### **Conclusions of Law**

The Missouri Public Service Commission has reached the following conclusions of law.

SWBT is a "Telecommunications Company" as that term is defined in Section 386.020(51), RSMo 2000, and is subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo 2000.

Section 386.330, RSMo 2000, grants the Commission the authority to "investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any telecommunications company subject to its supervision, . . ."

47 U.S.C. 251(c)(4)(A) imposes a duty upon SWBT, as a telecommunications carrier, to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."

47 U.S.C. 251(c)(4)(A) provides that SWBT, as a telecommunications carrier, shall not "impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service . . ."

Based on the evidence, the arguments of the parties, the Commission's Findings of Fact and its Conclusions of Law, the Commission determines that SWBT has not made its Local Plus service available for resale by companies providing service to their customers through the use of UNE's or through the use of their own facilities. SWBT will be directed to make Local Plus available for resale by such companies.

**IT IS THEREFORE ORDERED:**

1. That Southwestern Bell Telephone Company shall make its Local Plus service available for resale by companies providing service to their customers through the purchase of switching from Southwestern Bell Telephone Company as an unbundled network element.

2. That Southwestern Bell Telephone Company shall make its Local Plus service available for resale by a company providing service to its customers through the use of the company's own switch.

3. This Report and Order shall become effective on May 11, 2001.

BY THE COMMISSION



Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

( S E A L )

Lumpe, Ch., Drainer and Simmons, CC., concur;  
Murray, C., dissents with attached dissenting opinion;  
certify compliance with the provisions of Section 536.080,  
RSMo 2000.  
Gaw, C., not participating.

Dated at Jefferson City, Missouri,  
on this 1st day of May, 2001.



**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Investigation into the       )  
Effective Availability for resale of Southwestern       )  
Bell Telephone Company's Local Plus Service by       )  
Interexchange Companies and Facilities-Based       )  
Competitive Local Exchange Companies.       )

**Case No. TO-2000-667**

**Dissenting Opinion of Commissioner Connie Murray**

I respectfully dissent from this Report and Order because it goes beyond removal of the potentially anti-competitive aspects of SWBT's offering of Local Plus and may create a barrier to SWBT's continuing provision of this popular and beneficial service.

In TT-98-351, this Commission found, in approving SWBT's Local Plus tariff, that imputation of access charges was not necessary because the service would be available for purchase by CLECs and IXC's on both a resale and an unbundled network element basis. The Commission, at least impliedly, required that the service be available for resale by facility-based carriers as well as for resale by pure resellers. In that Report and Order, the Commission classified Local Plus as neither local nor long distance but as a hybrid.

The evidence is undisputed that pure resellers are allowed to purchase the service from SWBT at a wholesale discount and are entitled to the retail revenue from that service. SWBT retains control over its facilities and equipment and provides the specific service that is being purchased by the reseller. As such, SWBT remains responsible for paying all expenses incurred in the provisioning of the service, including terminating access charges and reciprocal compensation to third-party LECs. SWBT also remains

entitled to receive all other revenues from its facilities, including originating and terminating access charges and reciprocal compensation.

Carriers that are not pure resellers are those that provide service on their own facilities or through use of unbundled network elements (UNEs) purchased from SWBT or through a combination of their own facilities and UNEs. These facility-based providers cannot technically resell a SWBT service such as Local Plus because the service is only provisioned by SWBT over its own network. Facility-based providers can offer an identical service and would ordinarily be entitled to receive all revenues from use of their own facilities and be responsible for paying all terminating compensation to other carriers.

In the hybrid scenario created by the Commission in TT-98-351, however, facility-based carriers are treated as if they were resellers. There the Commission allowed SWBT to price Local Plus without imputing access so long as SWBT made the service available for "resale" to all carriers. The Commission thereby created a scenario to which ordinary rules of resale cannot apply.

The purpose of imputation of access is to avoid anti-competitive, below-cost pricing. When access is imputed, all access charges that the carrier is able to avoid in the provision of the service are imputed and treated as a part of the cost of providing the service being priced. In the case of Local Plus, the Commission allowed SWBT to price the service without imputing the access it avoids. SWBT is able to avoid paying access charges for terminating Local Plus calls to its own customers. It does not avoid paying access for terminating Local Plus calls to third-party LECs. Therefore, the potential for anti-competitive pricing of Local Plus was cured by requiring SWBT to allow "resellers"

to avoid the access that SWBT was able to avoid in its pricing of Local Plus. Since SWBT was never able to avoid paying access for termination to third-party LECs, it follows that SWBT should not be required to pay access to third-party LECs when the service is being "resold" by carriers other than pure resellers.

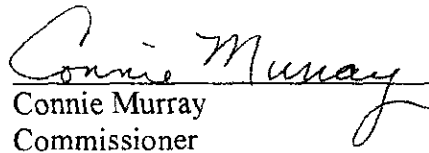
Although it still requires adoption of the fiction that facility-based carriers can be resellers, the reasoning proposed here provides a more equitable solution than is being achieved by today's Report and Order. This reasoning would, like the majority decision, require SWBT to allow both pure resellers and facility-based carriers to purchase Local Plus at a wholesale discount. Those carriers that are pure resellers would continue to pay nothing more than the wholesale discount and SWBT would continue to be entitled to the same revenues from the service that is resold and provisioned over its network as it receives when provisioning the service to its own retail end users. SWBT would also continue to be responsible to pay all charges for terminating calls to third-party LECs, just as it is when provisioning the service to its own retail end users. SWBT would receive the wholesale discount price, rather than the retail price for the service. All other costs and revenues to SWBT would remain the same as when provisioning the service to its own end users, except that SWBT would avoid the cost of marketing to the end users. All parties agree that SWBT is currently making the service available for resale to pure resellers under these terms and conditions. Nothing would change for the situation with pure resellers under my analysis.

I depart from the reasoning of the majority, however, when it comes to the treatment of facility-based "resellers." I would require those carriers that are facility-based to pay both the wholesale discount and the charges for terminating calls to third-

party LECs. Facility-based carriers would also receive the additional revenues from the service that SWBT would otherwise receive when provisioning the service over its own network to its own end users or to pure resellers because the facility-based carriers would be entitled to the revenue generated by provisioning service over their own networks. These carriers would avoid the cost of terminating to SWBT end users. Since the cost of terminating to SWBT end users is the most significant potential barrier to competitive provision of a Local Plus type service by facility-based carriers, this hybrid solution to a hybrid service would accomplish the goal of the Commission in TT-98-351, in a more reasonable manner than that of today's Report and Order.

For these reasons, I dissent.

Respectfully submitted,

  
Connie Murray  
Commissioner

Dated in Jefferson City, Missouri,  
on this 1st day of May, 2001.

Alt/Secretary: Woodbury, Bryce

Date Circulated 4-25 10-2000-667  
CASE NO.

LT 19, 10 (Should use original LATA)  
Lumpie, Chair

Paul 19  
Draimer, Vice Chair

Can NO Dissent to Attack  
Murray, Commissioner

KS  
Simmons, Commissioner

NP  
Gaw, Commissioner

5-1  
Agenda Date

Action taken: 3-1 AS

Must Vote Not Later Than \_\_\_\_\_

## STATE OF MISSOURI

### OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and  
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,  
Missouri, this 1<sup>st</sup> day of May 2001.

Dale Hardy Roberts

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

