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July 17, 2000

Mr. Dale Hardy Roberts
Secretary-Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102-0360

RE: Case No. TO-99-483

Dear Mr. Roberts:

Enclosed please find an original and eight (8) copies of the **Reply Brief of McLeodUSA Telecommunications Services, Inc.** for filing with the Commission in the above-referenced matter. Copies of this Reply Brief are being hand-delivered or mailed on this date to all parties of record, as per the attached Service List.

Thank you for your attention to this matter.

Sincerely,

Mary Ann (Garr) Young
WILLIAM D. STEINMEIER, P.C.



By: William D. Steinmeier

Enclosure

cc: Dana K. Joyce, General Counsel
Office of Public Counsel
Counsel for Parties of Record

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

In the Matter of an Investigation for the	)	
Purpose of Clarifying and Determining	)	
Certain Aspects Surrounding the	)	
Provisioning of Metropolitan Calling Areas	)	Case No. TO-99-483
Service After the Passage and	)	
Implementation of the Telecommunications	)	
Act of 1996.	)	

REPLY BRIEF OF MCLEODUSA

COMES NOW McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"),
by and through it's undersigned counsel, and, for its Reply Brief in this Matter, states as
follows:

ARGUMENT

No evidence was presented in this Matter by any party indicating that CLECs should not be allowed to participate in the MCA Plan. Indeed all parties, even SWBT, now agree that CLECs should be allowed to participate in the MCA Plan. Thus, the central question is under what terms and conditions should CLECs be allowed to participate. The correct answer to this is under the same terms that CLECs have been participating in the MCA Plan prior to SWBT's unilateral, unauthorized, and unlawful screening of CLEC MCA NXX codes.

It Is Appropriate for CLECs To Be Differentiated From ILECs Regarding MCA Service

If CLECs are not allowed to continue to enjoy the benefits of pricing flexibility,

geographic scope flexibility and reciprocal compensation (assuming same is provided for in an applicable interconnection agreement) CLECs will be unable to offer meaningful competitive choices to Missouri customers. As a result Missouri consumers will fail to receive the benefits of true open market competition and Missouri CLECs will fail to obtain the benefits of their substantial investment in providing facilities-based services in Missouri. Mandating the same terms and conditions for CLECs "would be deleterious to the competitive telecommunications market place in Missouri. Forcing CLECs to provide service at exactly the same levels as SWBT does nothing more than hamstring competitors by being able to offer fewer choices than what they would otherwise have been able to bring to the market place." (McLeodUSA, Starkey, Surrebuttal pp. 3-4.)

Competition without the ability to differentiate is not competition at all. Consumers have little if any incentive to ever switch to a CLEC if all a CLEC can provide is the same service under the same price as the ILEC. Staff concurs that it is necessary for CLECs to be provided with the flexibility to distinguish their service offerings from those of the monopoly ILEC providers. (Staff, Voight, Tr. 211-12). This is especially true, since, MCA service constitutes the vast majority of traffic in MCA markets. (Tr. 211). Given that MCA service is such a significant component of local service, especially in the mandatory tiers, without the ability to differentiate their MCA service offerings, CLECs will have a very limited opportunity to differentiate their overall service offerings from those available from ILECs.

Without competitive pricing and competitive outbound calling scopes, Missouri consumers will not receive the benefits of local competition. Rather, consumers will be able to purchase MCA service from various companies, but will have no choice in price or service. (Gabriel, Cadieux, Rebuttal, p. 35).

CLEC Differentiation From ILECs Does Not Undermine The Viability of the MCA

The ILECs cry foul at the notion of CLEC differentiation, contending that the sky will fall and that the MCA Plan will go to pieces if CLECs are not forced to abide by the precise same terms and conditions regarding geographic scope, pricing flexibility and intercompany compensation as the ILECs. (SWBT, Initial Brief, p. 51; Cass County, Initial Brief, p. 1, 10, 16; GTE, Initial Brief, p. 4, 5.) Although the ILECs express this sentiment in terms of being "concerned with the long-term viability of the MCA Plan," what they are really saying is that if ILECs are not allowed to maintain their traditional monopolistic competitive advantages with respect to offering local service, they will attempt to take their ball and go home and otherwise attempt to pressure the Commission into doing away with the MCA Plan. Apparently they have already "gotten" to public counsel in this regard: "I do not believe we've ever indicated that the plan as we know it could go away. However, in context of some meetings with Staff and OPC and the ILECs, I think it's fair to say that there was some discussion, at least among some of the parties if not in whole, that that could occur." (SWBT, Hughes, Tr. p. 996). The Commission should not be so persuaded. No evidence was offered as a basis for the notion that the MCA plan will come undone at the seams if CLECs are not required to provide MCA service under the same terms and conditions of the ILECs, only baseless speculation.

Office of Public Counsel witness Meisenheimer testified that Missouri consumers would be better served if CLECs were only allowed to offer precisely the same MCA service as ILECs. (Tr. 287-88.) Ms. Meisenheimer admitted, however, that this would lead to less competitive choice for Missouri consumers, though. (Tr. 288). She also indicated she believed less consumer choices were necessary to ensure the long-term viability of the MCA

plan. (Tr. 299-300.) Ms. Meisenheimer, however, did not provide a clear basis for why she feared for the long-term viability of the MCA plan if CLECs were allowed to differentiate their service from ILECs. Apparently, Ms. Meisenheimer bases her position that CLECs should be required to participate in the MCA plan on the precise same terms and conditions as the ILECs on her belief that CLECs are free to chose whether or not to participate in the MCA. (Tr. 313.) This is confusing and demonstrates a lack of understanding of the issues presented in this docket. If there is one thing that should be clear at this stage of the proceeding, it is the fact that CLECs are unable to compete in Missouri MCA markets without the ability to offer complete MCA service. Virtually every CLEC, along with staff, has presented unrefuted testimony to this fact. CLECs simply have no choice but to offer MCA service if they want to do business in St. Louis, Kansas City and Springfield.

CLEC Differentiation From ILECs Does Not Provide CLECs With An Unfair Competative Advantage

The ILECs contend that CLECs are trying to obtain an unfair competitive advantage over them by seeking to maintain reciprocal compensation, along with pricing and geographic scope flexibility. (SWBT, Initial Brief, p. 2-4; MITG, Initial Brief, p. 1) The ILECs fail to explain, however, why they offered no objection to reciprocal compensation and CLEC price flexibility all the while CLECs were offering resale and UNE-P service. The ILECs completely fail to explain why facilities-based market entry by CLECs should all of a sudden change the terms of CLEC MCA participation. The explanation is simple. The ILECs are attempting to use SWBT's call screening roadblock as leverage to extort new competitive restrictions on CLECs beyond the existing status quo of CLEC MCA

participation. This maneuver is highly disingenuous and undermines the policy of opening markets to competition. To accuse CLECs of using this proceeding to obtain an unfair competitive advantage, when it was SWBT's call screening conduct that brought this proceeding about in the first place is, to borrow a term from SWBT, ludicrous. CLECs are merely attempting to be put back in the position of MCA plan participation which they enjoyed prior to SWBT's illegal conduct.

Given the ILECs dominant market share, it is not unfair to allow CLECs to maintain pricing flexibility and reciprocal compensation as they develop facilities-based service. As staff witness William Voight testified:

With regard to the Commission mandates placed upon incumbents but not on competitors, I do not subscribe to the theory that each should be treated equally in all circumstances. Certainly barriers should be removed and over time, I would expect to have equal treatment among all carriers. But the statutes themselves establish certain requirements on incumbents not required of competitors. It is difficult to contemplate equal treatment in all instances when one supplier has historically controlled 100% of the market and still maintains 97% of the market almost 5 years after Congress debated and passed the Telecommunications Act of 1996. As for the incumbents operating in the MCA areas, I'm reminded that six of the nine I-LECs in the MCA areas still control 100% of the market.

(Staff, Voight, Surrebuttal, p. 19)

By insisting that CLECs be allowed to participate in the MCA only under the precise terms and conditions as ILECs, the ILECs ignore the significant body of Federal and State law which treats CLECs different from ILECs. Section 251(c) of the Federal Telecommunications Act of 1996 differentiates CLECs from ILECs in a number of significant ways that provide advantages to CLECs. Sections 251(c)(3)(Unbundled Access) and 251(c)(4)(Resale) are of particular benefit to CLECs. Additionally, CLECs are currently allowed to set prices for local service under Missouri statutes different from those of price cap

companies. Such laws recognize the huge competitive advantage enjoyed by incumbent carriers and the need to open markets to competition.

Pricing Flexibility

The ILECs contend that CLECs must be forced to abide by the same pricing terms as ILECs with respect to MCA Service. Cass County notes, "[m]aintaining the existing pricing structure for MCA is simply the only way to even the competitive playing field without jeopardizing the continued existence of the MCA Plan." (Cass County, Initial Brief, p. 11). SWBT also echoes this sentiment. (SWBT, Initial Brief, pp. 3-4). Even the playing field?! As though CLECs, who enjoy only a 2% share of MCA markets, and who have been denied the ability to offer facilities-based service, have some sort of competitive advantage. The ILECs simply do not want competition.

Cass County suggests that the "looking over the fence syndrome" will result if CLECs are given pricing flexibility. On the very next page of its reply brief, however, Cass suggests that "pricing flexibility for MCA service is unnecessary because CLECs have other avenues to set their service offerings apart." (Cass County, Reply Brief, pp. 13-14), and thus recognizes that looking over the fence will result anyway. In a competitive market place where consumers are given competitive choices, "looking over the fence" is an inevitable byproduct of the benefits of competitive choices which consumers receive.

CLECs have already been offering MCA service with pricing flexibility for several years in Missouri. There has been no evidence presented, and there is no policy reason, as to why the current status quo should change simply because CLECs have begun offering facilities-based services.

CLECs are classified competitive telecommunications companies in Missouri under section 392.361 RSMo. As competitive companies, section 392.361 RSMo allows tariff adjustments relating to pricing flexibility under section 392.500 RSMo. By virtue of these statutory provisions, CLECs operating in Missouri enjoy complete competitive pricing flexibility in establishing retail rates.

Requiring CLECs to set retail prices for MCA service at the rates provided by ILECs promotes a number of undesirable consequences and serves only to protect the monopolies enjoyed by ILECs in Missouri markets. First and foremost, Missouri consumers will be significantly harmed. The rates of existing CLEC MCA subscribers would be required to be raised and notice of same would be sent to customers. Not only would this likely confuse and frustrate customers, it is likely to cause CLECs to lose a significant portion of existing customers who, no doubt, came to the CLEC in the first place in large part due to the promise of lower rates. Missouri consumers who are not presently CLEC MCA subscribers (i.e., the vast majority of Missouri consumers) would also be denied the benefits of future competition and the corresponding choices that would flow from same. Second, as noted above, pricing restrictions on CLECs would be contradictory to the statutes recognizing CLECs as competitive telecommunications carriers and allowing CLEC pricing flexibility. Additionally, a pricing mandate would greatly reduce the incentive of CLECs to enter Missouri markets, especially with respect to the offering of facilities-based services and, thus, would constitute a violation of Section 253 of the Telecommunications Act of 1996 (the "Telecom Act") which prohibits barriers to competitive entry. (See Gabriel, Cadieux, Rebuttal, pp. 35-36). Finally, establishing a pricing mandate for CLECs would be highly discriminatory, as ILECs operating under price cap regulation enjoy pricing flexibility under

Section 392.245 RSMo. Indeed, SWBT is able to file tariffs either increasing or decreasing its MCA rates as discussed in its own testimony. (SWBT, Hughes, Tr. 1020-1021).

The Commission should not be swayed by the ILECs' unsupported claims that the MCA Plan will not be viable if CLECs are allowed to maintain pricing flexibility with respect to MCA service as McLeodUSA witness Starkey notes:

SWBT's desire for uniform treatment and service offerings that would include pricing for MCA Plans is nothing more than a thinly veiled attempt at revenue preservation by raising what CLECs would have to charge for MCA Plans. AT&T witness Kohly's succinct observation that the aim of competition is to bring charges closer to cost rather than to drive a competitors cost nearer to an ILEC's extremely high cost is right on the mark.

(McLeodUSA, Starkey, Rebuttal, p. 3)

If SWBT or any other ILEC desires competitive neutrality or complete pricing flexibility in this matter, it should petition the Commission pursuant to section 392.245.5 RSMo Cum. Supp. 1996. By petitioning the Commission under this section of the statute, the Commission could determine whether *effective* competition exists in such ILECs SWBT's area. (Staff, Voight, Surrebuttal, p. 18)

Intercompany Compensation

The ILECs contend that it is necessary to require CLECs to utilize bill-and-keep as the method for intercompany compensation, notwithstanding Commission approved interconnection agreements providing for reciprocal compensation. The ILECs contend that bill-and-keep is necessary to "allow the parties to compete on equal terms" (SWBT Initial Brief, p. 49) and is necessary to prevent the total termination of MCA service. (Cass County,

Initial Brief, p. 10.) The fallacy of SWBT's and other ILEC's contention that bill-and-keep is necessary to allow all parties to compete on equal terms is illuminated by the following uncontroverted testimony of Michael Starkey:

If the parties were of like size and had similar tenures of operation then it is possible that Mr. Hughes' testimony would have more relevance. However, the facts in this instance do not support Mr. Hughes' contention [that the Commission should mandate bill-and-keep for CLECs]. SWBT with the preponderance of customers, access lines, traffic, scale economies and enormous cash-flow stands to be the inequitable beneficiary in a bill-and-keep arrangement . . . CLECs with significantly lesser cash reserves may likely need to recover the costs they incur to terminate local traffic in a timeframe consistent within which they incur those costs (not, as a bill-and-keep arrangement, in a timeframe wherein they may likewise terminate in equal amount of traffic on the ILEC network at some point in the future). Smaller carriers face far more strenuous challenges associated with recovering costs in a timeframe consistent within which costs are incurred then do incumbents with extensive networks and enormous cash-flow, as such, Mr. Hughes' argument regarding "competitive neutrality" rings hollow. This point is further enhanced by the fact that neither Mr. Hughes specifically or SWBT generally describes why carriers wouldn't enjoy "competitive neutrality," if they were to compensate one another consistent with the FCC's rules on a reciprocal compensation basis.

(McLeodUSA, Starkey, Surrebuttal, p. 3)

As discussed in McLeodUSA's Initial Brief (pp. 17-18) the Telecom Act establishes a clear preference for reciprocal compensation as the method of intercompany compensation for CLECs. Furthermore, Section 252 of the Telecom Act creates detailed standards and procedures for negotiation, arbitration and approval of interconnection agreements. The Commission should not circumvent these provisions and impose bill-and-keep either retroactively or on a go forward basis. The Commission's authority to do so is greatly restricted by 47 C.F.R. 51.713(b) which requires that in order to impose bill-and-keep, the Commission must find 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 . . ." No such finding has been made in this case. More importantly no evidence in this regard has even been presented. As such it would be highly inappropriate for the Commission to mandate bill-and-keep in this Matter.

SWBT cites no authority which authorizes the Commission to override existing interconnection agreements or to require bill-and-keep on a go-forward basis. (See SWBT Initial Brief, p. 70) Rather, SWBT's only support offered for its contention that CLECs should be required to use bill-and-keep is its bald and incorrect assertion that "interconnection agreements did not contemplate CLEC participation in the MCA Plan." Id. This is clearly not true. In Case No. TO-96-440, the Commission approved the interconnection agreement between SWBT and Cable-Laying Company d/b/a DialUS ("DialUS"). The issue of CLECs offering MCA service was specifically raised in that case where the Commission held: "MCA service, where mandatory, is an essential part of basic local telephone service and as such is a part of the service that LECs must provide to competitors under the Act." (TO-96-440 Report and Order, p. 6) As discussed more fully in McLeodUSA's Initial Brief (pp. 12-14) CLEC participation in the MCA has been acknowledged in numerous interconnection agreements and tariffs approved by the Commission.

Geographic Scope

It is also necessary that CLECs be allowed to differentiate their service offerings with expanded calling scopes, in addition to pricing flexibility. (Staff, Voight, Tr. 211-12). Such

flexibility will benefit Missouri consumers by providing them with the benefits of competition. Certain CLECs disingenuously argue that, in attempting to maintain geographic scope flexibility, CLECs are attempting to compel the ILECs to expand their tollfree calling scopes to match that of the CLECs (SWBT, Initial Brief, p. 33) and are seeking to avoid payment of access charges on calls originated in the expanded calling scope (Id., Cass County, Initial Brief, p. 9). It is troublesome (nonetheless telling) that these parties, especially SWBT, whose own witness testified to the contrary, continue to make such knowingly untrue claims at the briefing stage of this proceeding. Mr. Hughes offered the following testimony at the hearing in this matter:

I would say that, based upon the testimony that I have heard this week thus far, that either I misunderstood the written testimony or they have clarified their written testimony, and I no longer believe that any party is advocating that they can change the calling scope and require that access be avoided.

(SWBT, Hughes, Tr. 967-68)

Prohibiting CLECs from offering expanded calling scopes not only deprives Missouri consumers of the benefits of competition, but also violates Section 253 of the Telecom Act by creating a barrier to entry in the form of a calling scope restriction which accompanied with a prohibition on pricing flexibility drastically limits a CLEC's ability to persuade customers to switch from ILECs.

SWBT's MOU

Not to be outdone by its intentional mischaracterization of the CLEC position on geographic scope flexibility, SWBT continues to maintain that its MOU arrangement with Intermedia Communications is an arms-length transaction between two parties on equal

footing. Clearly Intermedia signed the MOU under duress and in order to prevent irreparable harm to its business. (Intermedia, Mellon, Rebuttal, pp. 7-8; Staff, Voight, Direct, pp.39-40). SWBT's insistence otherwise (Tr. 1082, 1083, 1084; SWBT, Initial Brief, pp. 54-55), in the face of Intermedia's pre-filed testimony, hearing testimony, and initial brief is beginning to take on comic proportions and calls into question the veracity of its overall testimony.¹

The record in this matter overwhelmingly indicates that SWBT's proposed MOU and the compensation sought therein is a violation of the Telecom Act and a circumvention of this Commission's authority. As noted by McLeodUSA witness Michael Starkey:

SWBT expressly points out that the MOU is not an interconnection agreement subject to Sections 251 and 252 of T.A. '96. I believe this requirement on the part of SWBT is nothing more than a thinly veiled attempt to avoid its statutory obligation to carry this traffic subject to a reciprocal compensation arrangement.

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In addition to SWBT's mischaracterization of the nature of its MOU negotiations with Intermedia, SWBT has mischaracterized in several other portions of its own factual record. As discussed above, SWBT in its initial brief, (p. 33) accuses CLECs of attempting to compel ILECs to expand their tollfree calling scopes to match that of CLECs. This is despite the fact that its own witness, Thomas Hughes, testified that it was SWBT's understanding that no party was advocating that they could change existing calling scopes or require that access be avoided (Tr. 967-68). At p. 51 of its Initial Brief, SWBT states that "pricing flexibility" could destroy the long term viability of the MCA plan." This statement, however, again squarely contradicts the testimony of its own witness (again Mr. Hughes) who testified that CLEC pricing flexibility would not cause the MCA to terminate or otherwise affect its ongoing viability (Tr. 995). Likewise, Mr. Hughes testified that SWBT did not "believe we've ever indicated that the plan as we know it could go away (Tr. 996)." This testimony is also squarely at odds with SWBT's assertion in its brief (p. 51) that the long term viability of the plan would be harmed if CLECs were not mandated to comply with all of the same terms and conditions of MCA participation as the ILECs.

On p. 56 of its initial brief SWBT states that McLeodUSA's allegation that SWBT was providing preferential treatment to Intermedia is erroneous. It is amazing that SWBT is now making this statement in its initial brief. The point McLeodUSA witness Martin Wissenberg was making was not that SWBT was giving preferential treatment to Intermedia by allowing Intermedia to sign the MOU, but rather that SWBT had clearly engaged in the screening of some CLEC MCA NXXs and not others, as manifested by the fact that Intermedia at one time was clearly able to provide facilities-based services to its customers, under SWBT's radar screen. This of course is not a criticism of Intermedia, but is pointed out to illustrate the inconsistencies inherent in SWBT's screening procedures. SWBT misinterpreted this point in Mr. Hughes' rebuttal testimony (p. 10). This misinterpretation was squarely addressed and explained in detail in the surrebuttal testimony of Martin Wissenberg (p. 8-9). Nonetheless, at the briefing stage SWBT still has failed to get this very simple concept right. Either SWBT has not bothered to read McLeodUSA's testimony or it is deliberately distorting the factual record. Neither possibility speaks well of SWBT's veracity in this matter.

Second, SWBT's MOU ignores the fact that MCA traffic is local traffic and hence, that SWBT is obligated to compensate carriers that terminate that traffic on its behalf. In essence, SWBT's MOU, turns the T.A. '96's reciprocal compensation requirements on its head by requiring terminating carriers to compensate SWBT for originating calls. Third, SWBT's intercompany compensation rate of \$0.026 per minute in addition to being inappropriate as an originating charge is significantly in excess of SWBT's costs of carrying the traffic in issue. . . . I have had the opportunity to review the underlying TELRIC costs of nearly every RBOC in the nation. I have not at this point seen costs associated with local transport and termination that equate to \$0.026 per minute of use. SWBT's rate of \$0.026 is magnitudes higher than any cost based rate that I have seen for the termination of local traffic.

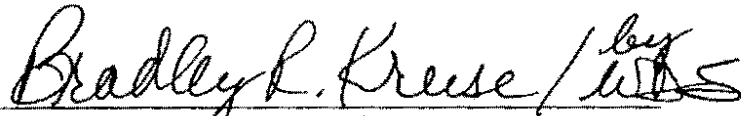
(Starkey, Direct, p. 9, p. 12)

CONCLUSION

SWBT contends that CLECs are attempting to reap the benefits of the MCA Plan without assuming any of its burdens by requesting pricing and geographic scope flexibility along with bill-and-keep intercompany compensation. This simply is not true. CLECs are merely attempting to continue to participate in the MCA plan with respect to facilities-based services under the status quo under which they participated with respect to resale services. Such participation is necessary to provide Missouri consumers with meaningful competition. SWBT's concerns with respect to pricing and geographic scope flexibility and intercompany compensation appear to be related more to SWBT's fear of facing actual competition in its MCA markets, and to its need to perhaps reevaluate its own services and their accompanying profit margins, than it has to do with protecting the sanctity of the MCA Plan or with protecting Missouri consumers. (McLeodUSA, Starkey, Surrebuttal, p. 4). Certainly the best situation for SWBT and other ILECs would be to face no competition at all in their local markets. Absent an entire lack of competition, the next best alternative that SWBT and the

small ILECs would prefer would be to have CLECs limited to providing resale services only. (Id. at p. 5). If CLECs rise to the level of offering facilities-based services, the next best alternative for SWBT and the small ILECs is for CLECs to be restricted to offering services under the precise terms and conditions offered by the applicable ILEC. Of course this does not promote true competition at all, and benefits only SWBT and other ILECs to the detriment of Missouri consumers and to Missouri CLECs who have invested significant monies in Missouri markets.

Respectfully submitted,

Handwritten signature of Bradley R. Kreuse in cursive, followed by a horizontal line and the initials "BRK".

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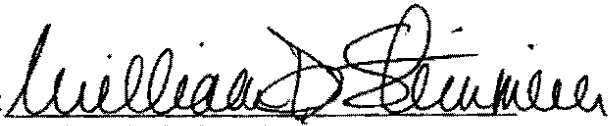
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief has been hand-delivered or mailed by first class mail, postage prepaid, to the parties of record shown on the attached service list on this 17th day of July, 2000.

Mary Ann (Garr) Young
WILLIAM D. STEINMEIER, P.C.

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William D. Steinmeier

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