Leo J. Bub
Senior Counsel

Southwestern Bell Telephone
One Bell Center
Room 3518
St. Louis, Missouri 63101
Phone 314 235-2508
Fax 314 247-0014
E-Mail lb7809@momail.sbc.com

Southwestern Bell

April 6, 2001

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, Missouri 65101

FILED²
APR 6 2001
Missouri Public
Service Commission

Re: Case No. TO-2000-667

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case is an original and eight copies of Southwestern Bell Telephone Company's Reply Brief.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Leo J. Bub /tm

Leo J. Bub

Enclosure

cc: Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[2]
APR 6 2001
Missouri Public Service Commission

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

SOUTHWESTERN BELL TELEPHONE COMPANY'S
REPLY BRIEF

Southwestern Bell Telephone Company respectfully submits this Reply to the Initial Briefs filed by ALLTEL Communications, Inc. ("ALLTEL"), the Missouri Independent Telephone Company Group ("MITG"), the Small Telephone Company Group ("STCG"), and Staff of the Missouri Public Service Commission ("Staff").

I. AVAILABILITY OF LOCAL PLUS FOR RESALE

While the other parties to this case agree that Southwestern Bell has made Local Plus® available for resale to pure resellers (Scenario 1 on Exhibit 18), they claim Local Plus has not been made available for "resale" to facility-based Competitive Local Exchange Companies ("CLECs") providing service to an end-user either through the use of Southwestern Bell's switch purchased on an unbundled network element ("UNE") basis (Scenario 2), or through all of their own facilities (Scenario 3). (See, ALLTEL Initial Brief, pp. 9-11; MITG Initial Brief, p. 6; STCG Initial Brief, p. 5; Staff Initial Brief, pp. 3-4).

But their positions are based on an oxymoron: Facility-based CLECs are simply not resellers. A CLEC providing service to an end-user on a facility basis (Scenarios 2 and 3) cannot be "reselling" an incumbent Local Exchange Carrier's ("LEC") service. As ALLTEL witness

83

Detling explained, a facility-based CLEC (those using their own facilities in their entirety or utilizing UNEs from an incumbent LEC, or a combination of the two) decides what services it wishes to offer, sets the local calling scope for its customers, and decides what vertical features to offer. And the provision of service in this manner would not be considered resale because the CLEC would be using its own facilities to provide the services. (ALLTEL, Detling T. 374-375). And specifically with respect to the Local Plus-type services, ALLTEL's witness admitted that when ALLTEL utilizes its own switch to provide it, ALLTEL is the provider of the service and it is not reselling Southwestern Bell's service. (ALLTEL, Detling T. 377). Rather, it is providing its own services using its own facilities.

This is a fundamental distinction that flows from the choice a CLEC has in how it provides service to its end-user customers. It can serve a customer by reselling the retail telecommunications services of the incumbent LEC (Scenario1). Or it can provide service as a facility-based carrier (Scenario 2 or 3).

But it cannot serve a customer doing both. The two are mutually exclusive methods of providing service. Each method affords a CLEC specific rights. And each carries specific responsibilities. The sharpness of the distinction between these two methods of providing service should be evident alone from the fact that they each arise from different sections of the Federal Telecommunication Act (Sections 251(b)(1) and (c)(4) for resale; and Section 251(c)(3) for UNEs); and the FCC's devoting hundreds of pages from its First Report and Order interpreting the Act to separately describe them (the FCC explained UNEs, access to UNEs, and their pricing at pp. 86-410; it explained resale at pp. 411-467).

These distinctions arising from the Act and the FCC's First Report and Order are reflected in all of the interconnection agreements that have been negotiated between CLECs and

incumbent LECs in the State. As the Commission is aware, these agreements take great care in defining what is meant by resale; and what is meant by the provision of service using UNEs. Staff -- and even ALLTEL's witnesses -- acknowledged that resale and the provision of service using UNEs (or one's own facilities) were different (Staff, Solt T. 259-269; ALLTEL, Krajci T. 346-347; Detling T. 373-374).

A prime example of the distinctions between these two methods of providing service can be seen in how interconnection agreements handle the responsibility for paying terminating compensation. With resale, the underlying LEC whose services are being resold remains the service provider and is the one responsible for paying applicable terminating compensation (both reciprocal compensation and terminating access charges). But when a CLEC provides service as a facility-based carrier, the CLEC is the service provider and is the one that has responsibility for paying terminating compensation. (ALLTEL, Krajci T. 347-348, 350-352; Staff T. 266-267, 269-271). And in reviewing the Dial U. S. interconnection agreement, the first negotiated in the State, the Commission itself determined that the underlying incumbent LEC is responsible for terminating compensation when its services are being resold and that the CLECs is responsible for paying terminating compensation when it operates as a facility-based provider.[1]

But mixing these two methods of providing service produces incongruous results. For example, Staff agrees that a CLEC providing a Local Plus-type service on a facility basis (Scenarios 2 and 3) should be responsible for paying terminating access charges when its calls go to third party LECs. But Staff takes issue with Southwestern Bell's expectation that it should also receive access charges when it terminates such calls. Staff indicates that since the same network facilities are used when a CLEC provides a Local Plus-type service using resale or when

[1] Case No. TO-96-440, Report and Order issued September 6, 1996, p. 6-7.

it does so using UNEs from Southwestern Bell, "there is no reason for the CLEC under Scenario 2 to pay SWBT more than the $24 wholesale discounted rate charged to a CLEC under Scenario 1." (Staff Initial Brief, p. 4).

In taking this position, however, Staff is ignoring a fundamental distinction between resale and the provision of service on a UNE basis. Under Section 252(d)(3) of the Act, the wholesale discount only applies to resale. (See, Section 252(d)(1)). With UNEs, on the other hand, the CLEC is purchasing the use of specific network facilities. As the FCC has indicated, the CLEC, in purchasing UNEs, steps into the shoes of the incumbent and is considered to be the facility-based service provider. The CLEC has the right to use those facilities to provide the services of its choosing and it is entitled to all revenues generated by those facilities. So while the facility-based CLEC would be responsible for paying other carriers to terminate its customers' calls, it would also be entitled to receive access charges when it is terminating calls from other carriers -- a revenue stream that CLECs operating on a resale basis are not entitled to receive. (First Report and Order, p. 466).

II STAFF'S CONCERN WITH COMPETITIVE SAFEGUARDS

Staff has indicated that without an imputation test, additional safeguards beyond the resale requirement should be considered. (Staff Initial Brief, p. 4). And some parties have suggested that confusion exists as to what was required by the Commission for Southwestern Bell to be excused from performing an imputation test and that Southwestern Bell should have sought clarification from the Commission. (See, e.g., MITG Initial Brief, pp. 2-5).

There was no ambiguity as to what was necessary for the imputation test to be excused. In the Commission's September 17, 1998 Report and Order in Case No. TT-98-351, the Commission discussed two separate requirements: resale, and making the same dialing pattern

functionality available to other carriers. But only the resale obligation was required for the imputation test to be excused:

> Since Local Plus has characteristics of both local and toll, i.e. is a hybrid, it is appropriate to use terminating access as a method of intercompany compensation. However, imputation of access charges would not be necessary if this type of service is available for resale at a wholesale discount to CLECs and IXCs. In 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.[2]

This is the same basis upon which the Commission excused the imputation test requirement for Southwestern Bell's Designated Number Service in Case No. TT-96-298. There, the Commission held that "Southwestern Bell's elimination of the resale restriction on designated number and its willingness to offer it for resale at wholesale rates resolved any concern that the Commission had regarding imputation." (Staff, Solt quoting order T. 272-273). In that case, the Commission imposed no requirement on Southwestern Bell to offer any specific dialing pattern functionality on a UNE basis, nor did it require Southwestern Bell to bear a competitor's access expense when that other carrier offered the same kind of service to its customers, regardless of whether that carrier used its own facilities or UNEs from Southwestern Bell. (Staff, Solt T. 274-275).

Moreover, the Commission's requiring only resale for the imputation test to be excused is fully consistent with economic theory. The Commission has traditionally required imputation tests on LEC toll services as a competitive safeguard to ensure that those services are not priced below the access charges a competing carrier would have to pay if it wished to offer a similar service. But it has excused imputation where the LEC was willing to offer the service for resale

[2] Case No. TT-98-351, Report and Order, issued September 17, 1998 at p. 38.

by other carriers at a wholesale discount. In this context, the resale requirement was intended to discourage below-cost pricing. It ensured that if a LEC offered a service below cost, its competitors would have the same ability to sell that below cost service -- but at the LEC's expense. The Commission has viewed resale as an alternate and adequate safeguard to ensure that a LEC's interexchange services are priced above the appropriate measure of cost.

As Southwestern Bell has demonstrated, it has complied with the Commission's resale requirement. At least 16 CLECs are actively reselling Local Plus. (SWBT, Hughes Rebuttal, p. 4). And processes, which Staff has found adequate (Staff, Solt Rebuttal, pp. 7-9), are currently in place at Southwestern Bell's Access Service Center to handle orders for Local Plus from IXCs that wish to resell it. (SWBT, Hughes Direct, pp. 7-8). While a facility-based CLEC (Scenarios 2 and 3) cannot "resell" Local Plus (or any other retail telecommunications service of the incumbent LEC) at the same time it provides service to an end-user using its own switch -- because that is not resale -- such carriers can still elect to serve a particular end-user via resale. As ALLTEL's witness acknowledged, a CLEC can choose, on a customer-by-customer basis, how it wishes to provide service to that customer. The CLEC can do it using its own switch; or it can purchase the incumbent LEC's retail telecommunications services (i.e., basic local service and any of the incumbent LEC's optional features the CLEC may wish to offer) and resell them. (ALLTEL, Krajci T. 346). In fact, this choice (which incumbent LECs do not have) gives CLECs the flexibility to provide service over their own facilities when it is profitable (based on the services the customer orders and usage patterns) and to use resale when it is not (thus forcing the incumbent to bear the expenses in providing service to that CLEC customer).

It is the availability of this choice to resell Local Plus that is the competitive safeguard. How a CLEC actually provides its Local Plus-type service is irrelevant. For if the CLEC finds

that serving a particular customer on a facility basis is uneconomic, it is free to use resale. It is this availability that serves as the pricing restraint.

In Southwestern Bell's view, additional safeguards are not needed. Staff, however, suggests that when a CLEC provides a Local Plus-type service on a facility basis (Scenario 2 or 3), Southwestern Bell should forgo receiving its tariffed access charges when it terminates those CLEC customer calls because Southwestern Bell does not pay itself access to itself to terminate its customer's Local Plus calls in other Southwestern Bell exchanges. (Staff Initial Brief, p. 4). (To be fair, Staff also indicated that CLECs offering a Local Plus-type service should also forgo receiving their access charges when the call flow is reversed, i.e., those CLECs should not be allowed to charge Southwestern Bell access to terminate their customers' Local Plus calls to CLEC customers. Staff, Solt T. 330-331).

But barring Southwestern Bell from receiving its tariffed rates for terminating another carrier's calls would be unfair and unlawful. As Staff acknowledged, Southwestern Bell incurs costs when it terminates a facility-based CLEC's Local Plus-type calls. (Staff, Solt T. 328). And to bar it from recovering those costs would be confiscatory. (Staff, Solt T. 329). Southwestern Bell's access tariffs (like those of the other LECs and CLECs in the state) have all been filed with and approved by the Commission. Such rates, as approved by the Commission, are prima facie lawful and reasonable until found otherwise in a suit brought for that purpose. Section 386.270 RSMo (1994).[3] See also Lightfoot v. City of Springfield, 236 S.W.2d 348, 353-354 (Mo. 1951) (a public utility's revenues collected pursuant to lawful and approved rates are a

[3] Section 386.270 RSMo (1994) states:

> **All orders prima facie lawful and reasonable** -- All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

property interest protected by the due process provisions of the state and federal constitutions). Even ALLTEL agreed, facility-based CLECs are required by their interconnection agreements and prior Commission orders to be responsible for paying terminating access charges on their customers' interexchange services. (ALLTEL, Krajci T. 348, 350-351). There is no reason for Local Plus-type traffic, which is also interexchange traffic, to be treated any differently.

However, if the Commission is concerned that the level at which Southwestern Bell has priced Local Plus may impede facility-based CLECs' ability to compete, the Commission is free to require Southwestern Bell to perform an imputation test. Staff agreed that if it is shown that Southwestern Bell passes an imputation test, it would not be necessary to force Southwestern Bell to forgo its tariffed access charges for terminating a facility-based CLEC's Local Plus-type calls. (Staff, Solt T. 331). Staff acknowledged that the imputation test is the normal method to ensure that the service is priced above its cost. (Staff, Solt T. 332).

III. ALLTEL'S ATTEMPT TO SHIFT ITS COSTS TO SWBT

For its own financial reasons, ALLTEL also argues that Southwestern Bell should be forced to forgo its tariffed access rates on Local Plus-type calls facility-based CLEC customers make that terminate in Southwestern Bell exchanges. But ALLTEL goes even further. It also seeks to have the Commission require Southwestern Bell be responsible for paying access charges on ALLTEL's customers' Local Plus-like traffic that terminates in other LEC exchanges (e.g., MITG and STCG exchanges).

This proposal is opposed not only by Southwestern Bell, but also by Staff. (Staff Initial Brief, pp. 5-6). Given the clear-cut distinction between resale and a provision of service on a facility basis, ALLTEL can only support its position by attempting to confuse the issue. ALLTEL's witnesses admitted during cross-examination that under federal law, prior

Commission orders and their own interconnection agreement with Southwestern Bell, ALLTEL is responsible for paying terminating compensation to Southwestern Bell and other carriers that terminate ALLTEL customer traffic because ALLTEL is a facility-based carrier with its own switch. (ALLTEL, Krajci T. 348, 353, 359; Detling T. 383). But in an effort to shift their terminating compensation responsibilities on their Local Plus-type service to Southwestern Bell, they simply wanted to "call it resale." (ALLTEL, Krajci T. 353-361; Detling T. 380-381). In their brief, ALLTEL described its scheme as follows:

> . . .ACI suggested a method whereunder it would purchase the Local Plus dialing pattern functionality from SWBT at the wholesale discount, utilize ACI's own switch, make the necessary switch translations and generate the necessary billing records, then send ACI's Local Plus traffic to SWBT (if necessary, over a separate trunk group) for transport on the Feature Group C network. (ALLTEL, Initial Brief p. 10).

Aside from the fact that ALLTEL's provision of a Local Plus-type service on a facility basis is not "resale," ALLTEL misrepresents what is occurring. Under this method of provisioning service, ALLTEL would not be "purchas[ing] the Local Plus dialing pattern functionality from SWBT." (Ibid.) Rather, as ALLTEL's own testimony make clear, ALLTEL would be providing the dialing pattern functionality itself through its own switch:

> Q. Let's talk about the technical ability. Would you agree with me that ALLTEL can program its switch?
> A. That's correct.
>
> Q. Okay. Then can it program its switch to offer a LATAwide calling scope to its customers on a flat-rated basis with seven, 10-digit dialing as applicable. Right?
>
> . . .
>
> A. Yes, we are capable.
>
> Q. You are capable of doing that yourself. Right?
> A. Yes. (ALLTEL, Detling T. 377-378)

Clearly, ALLTEL is simply engaging in semantics in an effort to shift costs that are rightfully ALLTEL's to Southwestern Bell:

> Q. Okay. But, again, when you're saying you're choosing to resell Local Plus, your proposal is to utilize your own switch which is different from how Southwestern Bell provides the retail service. Right?
> A. Yes.
>
> Q. You could offer the identical service to Local Plus, not call it resale and keep the revenue and bear the expense if you so choose. Right?
> A. Yes, we could.
>
> Q. Or you can utilize the exact same facilities, call it Local Plus, pay Southwestern Bell a discounted rate for the service and make Southwestern Bell bear the terminating expense. Right?
> A. That's correct. (ALLTEL, Krajci T. 360-361).

As Southwestern Bell indicated in its Initial Brief, it has no objection to interconnecting with ALLTEL and accepting traffic ALLTEL originates on its switch for termination in Southwestern Bell exchanges or for transport to an exchange owned by another LEC. However, when ALLTEL takes these services, it is clear under existing law, Commission-approved tariffs, and ALLTEL's interconnection agreement that what ALLTEL is taking is traditional access services -- both from Southwestern Bell and any other LEC that may be involved in handling that ALLTEL customer's call. Under tariffs the Commission approved in the mid-1980s and which have been used by all carriers in the state, such access service is provided and sold on a per minute basis.

But by trying to "call" its provision of an expanded toll calling plan "resale," ALLTEL is simply seeking to obtain for itself a flat-rated switched access service, which neither Southwestern Bell nor any other carrier offers. Any attempt to force Southwestern Bell to provide a service it has not voluntarily held itself out to offer would violate long-standing Missouri law and impose an unfair financial burden on it. State ex rel. Southwestern Bell Tel.

Co. v. Public Service Commission, 416 S.W.2d 109, 113 (Mo. banc 1967) (the Bellflower case) (holding the Commission is without power to order a telephone company to provide services which it has to voluntarily professed to offer).

IV. MITG AND STCG'S USE OF THIS CASE TO FURTHER THEIR AGENDA OF CHANGING THE BUSINESS RELATIONSHIP IN THE INDUSTRY

As Southwestern Bell indicated in its Initial Brief, MITG and STCG have no interest in the availability of Local Plus. Rather, they have their own separate agenda which they are using this case to advance. None of the small LECs in either group operates in Southwestern Bell territory and have no authority either to resell Southwestern Bell's Local Plus service or use its end office switches to provide a Local Plus-type service (or any other telecommunications service). While they have every right to be paid appropriate compensation for terminating Local Plus and any other type of traffic they may terminate, they are using this case to further their goal of getting the Commission to change the "business relationship" among the various carriers in the telecommunications industry. They seek to make Southwestern Bell and the other large tandem LECs financially responsible for all traffic that flows through their tandems, even if it is another carrier's traffic. (SWBT, Initial Brief pp. 2-3). This is very apparent from the briefs MITG and STCG filed in this case. In fact, the very first sentence of STCG's brief stated:

> If there was a proper business relationship between the member companies of the Small Telephone Company Group ("STCG") and the former Primary Toll Carriers ("PTCs") such as Southwestern Bell Telephone Company ("SWBT"), the STCG would have no need to be involved in this case. (STCG, Initial Brief p. 1)

MITG and STCG's attempt to use this case to further their agenda in attempting to change the "business relationship" between carriers in Missouri is inappropriate and beyond the scope of any of the issues identified for Commission resolution in this case. (See, Proposed List of Issues,

Order of Witnesses, and Order of Cross-Examination filed December 20, 2000 in this case by Staff).

MITG and STCG also continue to berate Southwestern Bell for the error it made in recording a portion of its Local Plus traffic. These carriers attempt to make it appear that Southwestern Bell was unconcerned about the small companies claims that they were not receiving all records for the traffic they were terminating and that Southwestern Bell's response was to simply "blam[e] the problem on other carriers." (STCG, Initial Brief pp. 3-4).

Nothing could be further from the truth. Southwestern Bell had been working with Mid-Missouri to reconcile the difference in records and had even suggested that Mid-Missouri participate in the industry records test that was to be conducted in Case No. TO-99-593 so the problem could be studied in-depth. And it was during this test, through the use of Southwestern Bell's new Hewlett Packard AcceSS7 System, that Southwestern Bell discovered its error. Upon discovery, Southwestern Bell immediately disclosed the problem to the industry and corrected the problem in a responsible manner. (Southwestern Bell's August 17, 2000 and September 8, 2000 correspondence to other carriers describing what it found and how it proposed to handle the problem was attached to Southwestern Bell witness Thomas Hughes Direct Testimony as Schedule 4). (SWBT, Hughes Direct, pp. 9-11). Southwestern Bell accepted full responsibility for its mistake and offered complete settlements to all impacted carriers. (SWBT, Hughes Direct, pp. 11-12; Dunlap Rebuttal, p. 7, T. 181).

Contrary to what MITG and STCG claim, the identification of this type of problem and the manner in which the industry has worked together to resolve it shows that the existing system and the relationship between the parties works and is capable of handling occasional recording or billing problems. Throughout the years, recording or processing errors were occasionally made

by both large companies and small LECs. But regardless of who made the errors, upon discovery, the errors were corrected and appropriate financial settlement adjustments made. The industry's approach with the Local Plus recording error was no different. While Southwestern Bell very much regrets its error, it views occasional audits, the identification of problems and their correction as the appropriate method of resolution. As a result of the industry records test, the overall integrity of industry systems have been verified and any problems found have been corrected. With these problems addressed, there is no need to scrap a system that has served the industry well for years. (SWBT, Dunlap Rebuttal, pp. 8-9).

V. CONCLUSION

Accordingly, Southwestern Bell would respectfully request the Commission to reject ALLTEL and the other intervenors' improper attempt to shift financial responsibility for another carrier's traffic onto Southwestern Bell; and find that Southwestern Bell has appropriately made its Local Plus service available for resale by CLECs and IXCs and the Local Plus dialing pattern and calling scope available on a UNE basis.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY Leo J Bub LTM

PAUL G. LANE #27011
LEO J. BUB #34326
ANTHONY K. CONROY #35199
MIMI B. MACDONALD #37606
Attorneys for Southwestern Bell Telephone Company
One Bell Center, Room 3518
St. Louis, Missouri 63101
314-235-2508 (Telephone)
314-247-0014 (Facsimile)
leo.bub@sbc.com (E-Mail)

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid U.S. Mail on April 6, 2001.

Leo J. Bub

DAN JOYCE
MISSOURI PUBLIC SERVICE COMMISSION
PO BOX 360
JEFFERSON CITY, MO 65102

JEFFREY A. KEEVIL
CHARLES BRENT STEWART
STEWART & KEEVIL, L.L.C.
1001 CHERRY STREET, SUITE 302
COLUMBIA, MO 65201

MICHAEL F. DANDINO
OFFICE OF THE PUBLIC COUNSEL
PO BOX 7800
JEFFERSON CITY, MO 65102

WILLIAM R. ENGLAND III
BRYDON, SWEARENGEN & ENGLAND
PO BOX 456
JEFFERSON CITY, MO 65102

CRAIG S. JOHNSON
LISA C. CHASE
ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.
PO BOX 1438
JEFFERSON CITY, MO 65102