ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.

ATTORNEYS AT LAW
305 EAST McCARTY STREET
P.O. BOX 1438
JEFFERSON CITY, MISSOURI 65102-1438
TELEPHONE 573-634-3422
FAX 573-634-7822

EUGENE E. ANDERECK
TERRY M. EVANS
ERWIN L. MILNE
JACK PEACE
CRAIG S. JOHNSON
RODRIC A. WIDGER
GEORGE M. JOHNSON
BEVERLY J. FIGG
WILLIAM S. LEWIS
VICTOR S. SCOTT

COREY K. HERRON
MATTHEW M. KROHN
LANETTE R. GOOCH
SHAWN BATTAGLER
ROB TROWBRIDGE
JOSEPH M. PAGE
LISA C. CHASE
OF COUNSEL:
MARVIN L. SHARP
PATRICK A. BAUMHOER
GREGORY C. STOCKARD (1904-1993)
PHIL HAUCK (1924-1991)

March 23, 2001

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

FILED[3]
MAR 2 3 2001
Missouri Public
Service Commission

RE: Case No. TO-2000-667

Dear Mr. Roberts:

Enclosed please find an original and eight (8) copies of the Initial Brief of the Missouri Independent Telephone Company Group in the above-referenced matter. Thank you for seeing this filed.

Sincerely,

Craig S. Johnson

CSJ:tr
Enclosure
cc: Bill Haas
Michael Dandino
Paul DeFord
W.R. England, III
Leo Bub
Kevin Zarling
MITG Managers

TRENTON OFFICE
9th AND WASHINGTON
P.O. BOX 547
TRENTON, MISSOURI 64683-0547
660-359-2244
FAX 660-359-2116

SPRINGFIELD OFFICE
1111 S. GLENSTONE
P.O. BOX 4929
SPRINGFIELD, MISSOURI 65808-4929
417-864-6401
FAX 417-864-4967

PRINCETON OFFICE
207 NORTH WASHINGTON
PRINCETON, MISSOURI 64673
660-748-2244
FAX 660-748-4405

SMITHVILLE OFFICE
119 E. MAIN STREET
P.O. BOX 654
SMITHVILLE, MISSOURI 64089
816-532-3895
FAX 816-532-3899

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[3]
MAR 2 3 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

INITIAL BRIEF OF THE MISSOURI INDEPENDENT TELEPHONE COMPANY GROUP

Introduction

All issues presented in this case devolve from certain language contained in the Commission's September 17, 1998 Report and Order in TT-98-351. Page 40 of that Order contained this language:

> "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 an unbundled network element basis."

SWB has unilaterally applied its interoperation that this language meant that facility based resale of LP would only be allowed pursuant to interconnection agreement (IA) structures provided by the Telecommunications Act of 1996 (TCA '96) for local traffic. SWB has applied this interpretation even though the Commission specifically determined that LP is access traffic, not local reciprocal compensation traffic. As a result of SWB's interpretation, several consequences occur:

1. IXCs cannot resell LP on a facilities-based basis without losing the uniform LP 19.2 % discount the Commission ordered, and incur the additional expenses of purchasing use of SWB facilities and paying terminating access to SWB and to third party LECs;

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2. CLECs cannot resell LP on a facilities-based basis without losing the uniform LP 19.2 % discount the Commission ordered, and incur the additional expenses of purchasing use of SWB facilities and paying terminating access to SWB and to third party LECs;

3. IXCs cannot utilize the non-1+ dialing pattern functionality the Commission ordered IXCs to be able to utilize;

4. The safeguard for competition established by the Commission--making LP available for resale at a uniform discount to IXCs and CLECs in lieu of an imputation test--is negated, making LP anti-competitive;

5. At the same time facilities-based resellers lose the uniform discount, incur additional expenses of using SWB facilities, and incur terminating access to SWB and third party LECs, SWB would gain additional advantage by:

   a. divesting itself of the responsibility under its tariff and the Commission Order to pay terminating access for LP terminating to non-SWB LECs; and

   b. receive new access revenues for facilities-based resellers' traffic terminating to SWB.

6. SWB would transfer the responsibility it has as the IC (Interexchange Customer) to pay small LECs access for traffic SWB delivers to facilities-based resellers, who have not established a business relationship pursuant to the terms of the small companies' access tariff.

SWB's interpretation is unwarranted. The Commission in issuing its Report and Order did not contemplate or intend any of these results

Is SWBT properly making Local Plus service available for resale to IXCs and CLECs?

The Commission's Original Intent

The Commission Order contemplated that SWB would be required to provide LP Resale at a uniform discount, and also would be required to pay terminating access on all LP traffic terminating to third party LECs. SWB attempts to rely upon Interconnection Agreement/Reciprocal Compensation structures to change its obligations. There is

nothing in the Commission Order contemplating the use of reciprocal compensation in such a way that the competitive safeguards would be undermined. Reviewing the 43 page Report and Order in TT-98-351, there is nothing which supports the notion the Commission intended the results obtained by SWB's interpretation.

In its discussion of these issues it is clear the Commission was attracted to the customer benefit afforded by a flat rate, unlimited calling, non-1+, LATA-wide calling plan. It is equally clear that the Commission was concerned that LP would hinder IXC and CLEC competition. LP had the local dialing aspect of local service. But it had the entire LATA as a calling scope. Approval of LP prior to intraLATA presubscription had the propensity to lock up the intraLATA toll market for SWB prior to the advent of intraLATA 1+ dialing parity and presubscription.

What chance would an IXC have of successfully marketing a SWB customer's intraLATA toll business when the customer could make all the intraLATA calls he or she needed for $ 30 a month? What chance would a CLEC have of successfully marketing a SWB customer's local business if the CLEC could not offer the entire LATA at a comparable price?

Page 13 of the Order cited MCI's testimony that LP would not recover its imputed access costs. At page 21-22 of that Order, the Commission cited Comptel's analysis that the breakeven point for LP prices covering only its associated access charge was between 5 and 9.08 hours of use per month[1]. SWB has not consistently recorded LP usage. At hearing the evidence presented as to the amount of usage was the February 18, 1999 email from Linda Countryman to James Krapf, James Freeland, Joyce Dunlap, and others

[1] See Ex 17, Ensrude rebuttal (Ex 23 in TT-98-351), pp 15-23.

which indicated an average usage many times the "break even" amount.[2] Even if all such usage terminated to a SWB exchange at a cost of 1 ¢ per minute, the cost of termination alone would exceed the price of LP by a factor greater than 8.

Page 22 of the Order contains references to the need for protection from anti-competitive effects of LP. The Commission at page 20 of the Order relied upon SWB's willingness to make LP available for resale at wholesale discount rates for this protection. SWB did not then state resale would *not* be available to facility-based CLECS or IXCs. Instead, SWB affirmatively represented that:

> "making a service available for resale at a discount guards against being priced under cost and, therefore, imputation of access charges is not necessary. She stated that, **since SWBT is the underlying carrier, it is assuming the risk and will be the one harmed if the service is priced inappropriately**. (page 20, emphasis added)

Nowhere does the Commission's Order contemplate that the provision of dialing pattern functionality via unbundled network elements would alter this analysis leaving the risk of inappropriate pricing with SWB. Instead the Commission Order accepted the competitive safeguard of making LP available to both IXCs and CLECs at a uniform discount in lieu of requiring an imputation test:

> " 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**". Order, pp 39-40.

It is clear that the Commission knew, accepted, and ordered that the competitive safeguard was a uniform discount that both IXCs and CLEC could use. It is clear the Commission did not intend that facility based provisioning of Local Plus would operate to eliminate this safeguard. SWB's interpretation emasculates this safeguard.

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[2] See Ex 21-P, page 28, See also Ex 19HC and Ex 20HC.

SWB should have obtained Commission Clarification

SWB knew its interpretation of the Order regarding the use of unbundled network elements for an IXC to provide dialing pattern functionality was inconsistent with the Commission's Order. The Order clearly stated that:

> "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 an unbundled network element basis." (emphasis added)

SWB's tariff filing letter of October 29, 1998 incompletely summarized this order by saying:

> "The September 17, 1998 Report and Order makes reference to the availability of unbundled network elements (UNEs) that would permit CLECs to offer a competing service using SWBT facilities." (emphasis added)

This statement did not comply with the Commission's Order. The Order did not "make reference to" UNEs, it *required* UNEs to be made available. The Order required UNEs to be made available **to IXCs** and CLECs, not just CLECs. The Commission made no mention of any requirement that an IXC or CLEC first obtain an interconnection agreement.

The direct testimony of SWB witness Hughes, Ex 1 at page 5, lines 5-8, makes the following reference to its October 29, 1998 tariff transmittal letter:

> "SWBT, however, does not believe it is necessary or appropriate to provide the "dialing pattern functionality" whatever that means, to an IXC. SWBT is not by filing this tariff waiving in any respect its ability to oppose any such requirement." (emphasis added)

If SWB did not know what dialing pattern functionality meant, as Ordered by the Commission, it should have requested clarification before filing the LP tariffs. Relying upon inaccurate renditions of excerpts from the Order in a tariff transmittal letter did not

comport with SWB's obligation either to comply with an Order, or to seek clarification if the Order was not understood, or to request rehearing and judicial review of the Order if SWB did not intend to comply.

If SWB opposed making dialing pattern functionality available to IXCs, as Ordered by the Commission, it should have requested clarification before filing the LP tariffs. It was not compliance or obedience with the Order for SWB to "not waive" its "ability to oppose" an affirmative obligation imposed by a Commission Order. § 386.490 RSMo made it SWB's obligation to accept and obey the Commission's September 17, 1998 Report and Order, or seek rehearing and judicial review.[3] SWB had no discretion to "not waive" compliance. SWB had no "ability to oppose" the Order whatsoever, absent rehearing and reversal. SWB was without the authority to refuse to implement the Order. The Order is now binding upon SWB in this collateral action.[4]

It was inappropriate for SWB to knowingly refuse to implement the Order, as written. The effect of SWB's refusal was to thwart facilities based resale of LP by IXCs and by CLECs. At hearing it was established that in the two years following the Order, all resale of LP is being conducted on a "pure resale" basis, with no facilities-based provisioning. SWB's non-compliance has accomplished two things, both of which were contrary to the Commission's original intent:

1. SWB has discouraged facilities-based competition;

2. SWB has ensured that all LP traffic continues to be placed on SWB facilities.

[3] §§ 386.490.2, 386.570, and 386.580 RSMo made it SWB's obligation to accept and obey the Order, unless it exercises its right pursuant to §§ 386.500 and 386.510 RSMo to pursue judicial review.
[4] § 386.550 RSMo.

The manner in which SWB has chosen, without Commission sanction, to limit facilities-based resale of LP, should be of no binding consequence whatsoever. This Commission is free now to announce the meaning of its September 19, 1998 Order, and to direct compliance with that meaning. SWB cannot be heard to complain if the Commission's announced meaning differs from SWB's interpretation. SWB has waived its right to complain by failing to follow the law in timely and appropriately requesting the Commission to clarify its meaning. It was inappropriate for SWB to attempt to circumvent the clarification, rehearing, and review process

The Commission is not limited to Ordering UNEs under the TCA '96

The Commission Order nowhere mentioned that the uniform-discount was subject to being overridden by local interconnection agreement/reciprocal compensation provisions of the Telecommunications Act of 1996. Yet, in its filing letter of October 28, 1999, SWB stated:

> "This issue (of UNEs) is more appropriately raised in the context of negotiations under the Telecommunications Act of 1996" .

Also, the testimony of Mr. Hughes at several places reiterated SWB's attempt to convert the requirement to provide dialing pattern functionality to a requirement that facilities-based resellers (CLECs only) would have to negotiate interconnection agreements. SWB then intended the IA would override the uniform discount, and would override SWB's obligation to pay terminating access. See Ex 1, pp 4, 5; Ex 2, pp 7, 9, 10, 11, 1213, 14, 15, 16; Ex 3, p 9; Ex 4, pp 1, 2.

The unspoken assumption that SWB makes is that the Commission's use of the terms "unbundled network elements" regarding dialing pattern functionality meant that any facilities based provisioning of LP could only be done under the authority of a TCA

'96 Interconnection Agreement. This is not true. The Commission had authority under Missouri law to order SWB to provision unbundled network elements. The Commission had this authority regardless of the provisions of the TCA '96. Moreover, as LP traffic is access traffic, not local traffic for compensation purposes, the interconnection agreement/reciprocal compensation provisions of the TCA '96 cannot apply to LP.

§ 392.240.1 RSMo authorizes the Commission to determine the "rates, charges, tolls, or rentals demanded, exacted or charged" for the transmission of messages or communications, or for "the rental or use of any telecommunications facilities" affecting a rate, charge or service. § 392.240.2 RSMo grants the Commission the authority to determine the changes in rates, connections, and service when SWB proposed converting toll calls to LP calls. Finally, § 392.240.3 RSMo grants the Commission the authority to not only determine the nature of the service, connections, and charges for services such as facilities-based provisioning of LP, but also to order SWB to make dialing pattern functionality available on an unbundled network element basis in order to allow facilities based resale of LP between SWB and CLEC and IXCs .

The Commission had independent Missouri statutory authority to order SWB to make dialing pattern functionality available to both CLECs and IXCs at a uniform discount, without resort to interconnection agreements under the Act. Even the Act recognizes that it does not disturb or pre-empt Missouri's statutes applicable to approval or regulation of the LP service. See 47 USC 253 (b) and 47 USC 252 (e)(3).

The Commission classified LP as access traffic for purposes of intercompany compensation. Reciprocal compensation under IAs is only available for traffic the Commission defines as local. That being the case, SWB's attempt to apply

interconnection agreement structures is not sanctioned by the TCA '96, and is inappropriate.

SWB's interpretation of the Commission's September 17, 1998 Order in this regard is not reasonable or warranted. It is a far more reasoned interpretation to read the Order as meaning exactly what it said: CLECs and IXCs would have dialing pattern functionality available on a UNE basis and at a uniform discount justifying the lack of an imputation test[5].

IXCs do not order UNEs under the TCA '96

There is one other significant term of the Order which substantiates that the Commission intended SWB to make dialing pattern functionality available on a UNE basis as a matter of Missouri regulation separate and apart from IA structures contained in the TCA '96. The Commission's Order directed that "dialing pattern functionality should be made available for purchase to IXCs and CLECs on both a resale and an unbundled network element basis". If the Commission truly intended for the UNE language to trigger application of TCA '96 interconnection principles, it would not have imposed this requirement for **IXCs**. The interconnection agreement procedures under the TCA '96 are not available to IXCs. IXCs are not authorized to obtain UNEs from an ILEC as part of the options available to be able to sustain local competition with the ILEC.

The Commission did not classify LP as local for reciprocal compensation purposes

Yet another significant term of the Order completely inconsistent with SWB's interpretation has to do with classification of the service. In order for the interconnection agreement provisions of the TCA '96 to apply, the Commission must define the calling

scope between SWB and an facility-based competitors as *local*. The Commission's order did not do that. In fact, the Order was very clear that for intercompany compensation purposes LP was subject to access compensation[6], not local reciprocal compensation. The Order directed the complete opposite of what is required in order to justify the applicability of interconnection agreement reciprocal compensation principles of the TCA '96.

TCA '96 Interconnection Agreement Structures do not apply to Access Traffic

Section 251(c)(2) of the TCA '96 imposes upon ILECs the duty to provide interconnection to requesting competitors. The FCC specified that the duty of interconnection only refers to a linking of two carriers' networks for the transport and termination of traffic, and does not effect exchange access charges:

> "The interconnection obligation of section 251(c)(2), discussed in this section. allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic." (¶ 172)

> "We conclude that the term "interconnection" under section 251(c)(2) refers only to the **physical linking of two networks for the mutual exchange of traffic**.....We note that because interconnection refers to the physical linking of two networks, and **not the transport and termination of traffic, access charges are not affected by our rules implementing section 251(c)(2).**" (¶ 176)

At paragraphs 186-191 the FCC concluded that IXCs requesting interconnection to originate or terminate interexchange traffic is not entitled to receive § 251(c)(2) interconnection, as interexchange service is not telephone exchange service or exchange access service:

> "We tentatively concluded in the NPRM that interexchange service does not appear to constitute either "telephone exchange service" or "exchange access". "Exchange access is defined in section 3(16) as "the offering of access to

[5] Staff witness Solt agreed, Ex 5, pp 5-7; as did ACI witness Redfern, Ex 8 pp 4-6 and Ex 9, pp 4-7.
[6] Ex 16, Schoonmaker, pp 4-8; T. 72-73, Hughes.

telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." We stated that **an IXC that requests interconnection to originate or terminate an interexchange toll call is not "offering" access services, but rather is "receiving" access services.** (¶ 186)

"We concluded, however, that an IXC that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network **is not entitled to receive interconnection pursuant to section 251(c)(2)...A telecommunications carrier seeking interconnection only for interexchange services is not within the scope of this statutory language because it is not seeking interconnection for the purpose of providing telephone exchange service....We conclude that a carrier may not obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating interexchange traffic, even if that traffic was originated by a local exchange customer in a different telephone exchange of the same carrier providing the interexchange service...**" (¶ 191)[7]

This holding makes it clear that SWB cannot avail itself of § 251(c)(2) interconnection agreements for the termination of LP traffic. In a recent March 13, 2001 Memorandum Opinion and Order in E-97-003, "In the Matter of Total Telecommunicaitons and Atlas Telephone v. AT&T, the FCC again held that the § 251(a)(1) term "interconnect" refers solely to a physical linking of two networks, and that there is a distinction between "interconnection" and "transport and termination". The FCC specifically held that the ILEC duty to interconnect under 251(c) does not require ILECs to transport and terminate traffic. The FCC went further to rule that the duty under 251(b)(5) to establish reciprocal compensation for the transport and termination of local traffic cannot be reasonably be interpreted to encompass a general requirement to transport and terminate access traffic. Once again FCC precedent rejects SWB's assumption that third party LECs have to accept indirect interconnection traffic on a non-access basis.

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

All parties agree that for pure resale, SWB remains responsible to pay terminating access charges to third party LECs. However, where a CLEC or IXC utilizes its own facilities in conjunction with UNEs from SWB, there is a dispute.

SWB is the IC under small company access tariffs, and cannot divest itself of the obligation to pay terminating access

SWB has ordered an access trunk from small companies pursuant to the small companies' Oregon Farmers Access Tariff. By doing so, SWB has established an IXC business relationship for the payment of terminating access pursuant to the tariff[8]. Under that business relationship, SWB is responsible for all LP traffic delivered on its trunk. It makes no difference to the small company if the traffic was originated by a pure reseller or by a facilities based reseller. As long as the LP traffic was delivered by SWB on the trunk assigned to SWB, SWB is responsible for every minute. In contrast, facility based resellers of LP that have not ordered access from small LECs are not responsible to pay for traffic delivered by SWB on SWB's trunk.[9]

LP is an end to end LATA wide offering of SWB

Local Plus is a tariffed service offering of SWB. SWB holds itself out to terminate LP calls wherever they may terminate throughout a LATA. The obligation to provide resale at a discount, the obligation to provide dialing pattern functionality, and

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[7] August 8, 1996 Interconnection Order, FCC 96-325, CC Dockets 96-98 and 95-185.
[8] SWB is thereby an Interexchange Customer or "IC" under the access tariff.

the obligation to pay terminating access on all LP calls, all are obligations that the Commission imposed upon SWB's LP service offering as conditions to approval. These were the conditions the Commission applied to safeguard from anti-competitive effects.

When a facilities based reseller resells LP, it must be allowed to do so at the uniform discount. SWB must be responsible for terminating access on facilities based resold LP. This is the only way to assure that SWB bears the risk the service is not appropriately priced. If this assurance is not preserved, the justification for avoiding an imputation test disappears. If this assurance is not preserved, the safeguard against anti-competitive effects on IXCs and CLECs disappears.[10]

Relief requested

The MITG respectfully requests that the Commission Order that SWB must make LP available for resale to both IXCs and CLECs, with the non-1+ dialing pattern functionality, at a uniform discount, without the necessity of an Interconnection Agreement for facilities based resellers, that SWB be ordered to be responsible to pay terminating access to third party LECs for all LP traffic, SWB's, pure resold, or facilities-based resold LP, and further that SWB be directed to immediately implement such terms for the resale of LP traffic.

[9] Ex 12,. Jones, pp 10-13; Ex 13, Jones, pp 8-9; Ex 14, Jones, pp 9-11.
[10] Ex 15, Jones, pp 9-11.

ANDERECK, EVANS, MILNE,
PEACE & JOHNSON, L.L.C.

By _____

Craig S. Johnson MO Bar No. 28179
The Col. Darwin Marmaduke House
700 East Capitol
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822

ATTORNEYS FOR MITG

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed, via U.S. Mail, postage prepaid, this 23rd day of March, 2001, to all attorneys of record in this proceeding.

_____
Craig S. Johnson MO Bar No. 28179