BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

IN THE MATTER OF AN INVESTIGATION FOR THE PURPOSE OF CLARIFYING AND DETERMINING CERTAIN ASPECTS SURROUNDING THE PROVISION OF METROPOLITAN CALLING AREA SERVICE AFTER THE PASSAGE AND IMPLEMENTATION OF THE TELECOMMUNICATIONS ACT OF 1996	)	Case No. TO-99-483

INITIAL BRIEF OF MCLEODUSA

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), by and through its undersigned counsel, submits its Initial Brief and in support hereof states as follows:

SUMMARY

The Missouri Public Service Commission (the "Commission") should immediately enter an order reaffirming that any properly certified and properly tariffed CLEC attempting to provide facilities-based services in the metropolitan calling area plan ("MCA plan") may participate in the MCA plan. Such order should also direct SWBT to immediately stop screening the NXX prefixes of CLECs offering facilities-based service in MCA plan markets.

CLECs Already Are Authorized To Participate In The MCA

The Commission has previously authorized CLEC participation in the MCA in numerous orders approving interconnection agreements and tariffs. Indeed, CLECs have been participating in the MCA offering resold services since 1996. For SWBT suddenly to distinguish CLECs providing facilities-based service as somehow not being authorized to participate in the MCA is highly dubious and unsupported by existing law or the evidence

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presented in this docket. SWBT's practice of screening the NXX-prefixes of CLECs who attempt to offer facilities-based services in MCA markets, and its refusal to recognize CLECs as proper participants in the MCA plan, should be immediately stopped.

SWBT's Conduct Places CLECs at a Significant Disadvantage

As a result of SWBT's call screening conduct, CLECs attempting to offer facilities-based services in MCA markets currently have no choice other than to either offer a much inferior product (as a result of being denied equal MCA plan participation by SWBT), or to sign SWBT's proposed Memorandum of Understanding ("MOU"), obligating such CLEC to pay SWBT $0.026 per minute for calls originated by SWBT's customers and terminated on the CLEC's facilities. SWBT's proposed MOU "solution," however, is nothing more than an improper revenue replacement ploy whereby SWBT seeks to recover revenues lost when its customers make marketplace decisions to switch to CLECs. In McLeodUSA's case, the proposed MOU offers less profit for its facilities-based service than were McLeodUSA to simply continue reselling SWBT service.

SWBT's Conduct Is Improper

The evidence provided in this proceeding (not the least of which is the ample and thoughtful testimony of the Commission's Staff), overwhelmingly indicates that SWBT's practices are significantly anti-competitive and constitute a substantial barrier to market entry for CLECs wishing to provide facilities-based services in Missouri MCA markets. SWBT's conduct, besides denying CLECs the benefits of millions of dollars of facilities-based service investments in Missouri, deprives Missouri consumers of the benefits of meaningful local competition. As set forth more fully below, SWBT's conduct circumvents the authority of the Commission and violates the Federal Telecommunications Act of 1996 (47 U.S.C.

Section 251 et seq.)(the "Telecom Act") in numerous ways. Specifically SWBT's conduct violates the interconnection provisions of Section 251, violates the reciprocal compensation provisions of Section 252, creates a barrier to entry in violation of Section 253, and creates dialing disparity in violation of Section 251.

SWBT Has Circumvented The Commission's Authority

Perhaps even more troubling than the conduct itself, is SWBT's demonstrated willingness to act outside of the scope of authority granted by the Commission, and its willingness to violate the Telecom Act with impunity. When faced with what it perceived as a competitive issue, SWBT failed to seek resolution with the Commission but, rather, unilaterally imposed a competitive roadblock for CLECs wishing to offer facilities-based MCA service. Continuing this trend, SWBT further circumvented the Commission in proposing its MOU (which contained untariffed rates and otherwise violated the Telecom Act). This willingness to circumvent Commission authority and violate the Telecom Act creates a very uncertain regulatory and, hence, competitive, environment for CLECs. SWBT should be sanctioned so that it is deterred from circumventing Commission authority in the future.

Commissioner Drainer's Questions

It would violate the intent of the Telecom Act were the Commission to require that all future agreements adopt bill and keep as the method of inter-company compensation. The same would result if the Commission determined to override the reciprocal compensation provisions of existing (Commission approved) interconnection agreements. Additionally such an action by the Commission would violate long-standing principles of contract law, and would establish a very poor precedent by causing significant uncertainty for all carriers

and customers alike. Additionally, it would violate the Telecom Act and Missouri legislation if the Commission were to require CLECs to interconnect with small ILECs as a condition to continued MCA participation.

What The Commission Should Order

All CLECs who are properly tariffed to provide MCA Service in Missouri should be allowed to participate in the MCA plan under terms that provide CLECs the flexibility to compete meaningfully with ILECs. As to pricing, CLECs, by definition do not possess the market power necessary to warrant that their pricing for MCA Service be capped at the rates of the ILECs. Thus, CLECs should be permitted pricing flexibility sufficient to offer Missouri consumers a true competitive choice with respect to MCA service. With respect to inter-company compensation, whatever form is specified in any relevant interconnection agreement approved by this Commission should be controlling. In the absence of an interconnection agreement, bill and keep would be utilized. As to geographic scope, CLECs should have the flexibility to expand the existing MCA scope, provided switched access charges apply to any traffic beyond the existing scope.

FACTUAL BACKGROUND

A. The MCA plan

The MCA plan was established by the Commission's Report and Order in Case No. TO-92-306, Date Effective, January 5, 1993 (the "Report and Order"). The MCA plan is a two-way interexchange, geographically defined, calling service, which is charged on a flat rate. The result is the creation of various calling scopes that give MCA plan subscribers the ability to make toll-free calls in the metropolitan areas of St. Louis, Kansas City and Springfield on a greatly expanded basis. The purpose of the MCA, as articulated in the

Report and Order, is "to fashion new expanded calling scope services that will address existing customer complaints, desires and needs..." The MCA calling scopes established by the Commission cross exchange boundaries, local calling scopes of individual exchanges and individual company boundaries. Subscribers to MCA service are allowed to purchase unlimited interexchange calling packages at a flat rate. (Direct Testimony of Martin Wissenberg, pp. 3-4.)

In St. Louis and Kansas City, the geographic scope of the MCA is made up of six tiers of exchanges spreading out from the MCA central exchanges. In Springfield the geographic scope of the MCA is made up of three tiers of exchanges spreading out from the MCA central exchanges. The MCA calling scope established by the Commission crosses exchange boundaries, local calling scopes of individual exchanges and individual company boundaries. Pursuant to the Commission's Report and Order, all LECs within the geographic scope of the MCA are required to participate in the MCA. With respect to Missouri customers in Kansas City and St. Louis, customers in the MCA central, MCA-1 and MCA-2 tiers automatically receive mandatory MCA service. In the other tiers of all MCA exchanges MCA service is optional and customers can choose whether or not to subscribe. In the areas where MCA service is optional, such service is billed as an additive to customers' bills and is classified as a local service. Additionally, in these optional areas, MCA service is designated and provisioned through the assignment of separate NXX central office codes in each exchange. (Wissenberg Direct, p. 4.)

B. SWBT's refusal to recognize CLECs as participants in the MCA plan, and its implementation of call screening procedures

SWBT does not recognize CLEC prefixes as MCA prefixes and does not recognize CLECs as participants in the MCA with respect to facilities-based service. (Wissenberg Direct, p. 5; Testimony of Thomas Hughes, Transcript of Proceeding, p. 1037.) In order to prevent CLECs providing facilities-based service from participating in the MCA, SWBT has programmed its switches and developed techniques enabling it to "screen" CLEC prefixes, such that when an SWBT MCA subscriber calls a CLEC MCA subscriber in an MCA zone where the call would normally be processed as a local/toll-free call were the call recipient an SWBT customer, the call is processed as a toll call. (Direct Testimony of Edward J. Cadieux, pp.12-13) Thus, the SWBT MCA subscriber must dial 1 plus ten digits and is assessed a toll charge to call the CLEC MCA subscriber, when that same call would have required only local (seven digit) dialing and been toll-free, were both parties to the call SWBT MCA subscribers. (Wissenberg Direct, p. 5; Cadieux Direct pp.11-13.) Additionally, SWBT has refined its screening techniques such that it is able to recognize an LNP number that is a non-SWBT customer number. (Wissenberg Direct, p. 5) SWBT does not screen the MCA NXXs of the other ILECs, nor does SWBT's screening tactics apply to CLECs offering resold or UNE-P services. (Hughes Testimony, Tr.999-1000, 1009-11.)

C. SWBT's Proposed "Solution" for CLECs seeking MCA plan access: the imposition upon CLECs of a $0.026 per minute surcharge on calls to CLEC MCA Subscribers.

On December 21, 1999, shortly after the Commission issued its Order Establishing Procedural Schedule (etc.) in this case, SWBT issued an Accessible Letter to CLECs offering a Memorandum of Understanding (the "MOU"), that had already been signed by Intermedia

Communications, Inc.("Intermedia"). (Exhibit 1, Schedule 6.) Under the proposed MOU, SWBT would allow competitors to participate in the MCA only if the competitor agreed to pay SWBT 2.6 cents per minute per call originated from a SWBT MCA subscriber that is terminated to a CLEC MCA subscriber. No CLEC other than Intermedia has signed the MOU and Intermedia did so without adequate bargaining leverage and under extreme duress, being faced with potential irreparable harm to its business. (Rebuttal Testimony of Cheryl Mellon, pp. 5-8.)

ARGUMENT

I. SWBT'S CONDUCT VIOLATES THE TELECOMMUNICATIONS ACT IN NUMEROUS WAYS

A. SWBT's Conduct is Profoundly Anti-Competitive and Creates a Barrier to Entry in Violation of Section 253

Section 253(a) of the Telecom Act provides that:

> No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Because of SWBT's dominant market share (Surrebuttal Testimony of William Voight, Ex. 2; Hughes Testimony, Tr.1019-20) and because of its refusal to recognize CLEC customers as MCA plan participants, a CLEC customer's MCA "calling scope" is necessarily much smaller than and, hence, inferior to, the MCA "Calling scope" offered by SWBT. As a result, the CLEC's products and services are necessarily inferior to those offered by SWBT. The inability to offer competitive products acts as a significant deterrent to McLeodUSA's

ability to offer facilities-based services in Missouri MCA markets. (Direct Testimony of Jeff Oberschelp, pp. 8-9.)

SWBT's screening of CLEC prefixes and its refusal to recognize CLECs as participants in the MCA plan, makes it extremely unlikely that ILEC MCA plan subscribers would be willing to change their service over to a CLEC (or remain with a CLEC after a service change). In situations where the terminating party to a call has switched from an ILEC to a CLEC, the originating caller, who had always made certain calls on a local basis, now finds themselves having to dial 1 plus ten digits and being assessed toll rates for the same calls that used to be made toll-free with local seven digit dialing. This change in rates and dialing pattern generates customer confusion and frustration, not only for the SWBT customer who is originating the call, but for the CLEC MCA subscriber who receives the call and the inevitable complaints from the call originator. As a result, MCA customers are given a strong incentive to remain with, or return to, their ILEC of choice (typically SWBT), or risk disenfranchising parties that call them for business or personal reasons. (Oberschelp Direct, p. 5).

The negative competitive effect of this situation upon CLECs is obvious. CLEC service is stigmatized as being inferior to ILEC service. The new CLEC MCA customer receives inferior service solely as a result of the decision to switch service from an ILEC to a CLEC. As a result CLECs are put at a very distinct and significant competitive disadvantage when attempting to offer facilities-based products and services in competition with ILECs in Missouri MCA plan markets. (Oberschelp Direct, p. 6)

B. SWBT's Conduct Violates the Interconnection Provisions of Section 251

Section 251(c)(2) of the Telecom Act requires that incumbent LECs:

> Provide for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -
>
> > (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection; and
> >
> > (D) on rates, terms, and conditions that are just, reasonable, and non-discriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and Section 252.

SWBT violates subsection (C) by screening CLEC MCA NXX prefixes. Not only are such screening practices not referenced in McLeodUSA's interconnection agreement with SWBT, such practices significantly lessen the quality of interconnection provided to McLeodUSA and other CLECs compared with the quality of interconnection which SWBT provides itself.

SWBT violates subsection (C) by attempting to charge its competitors the $0.026 MCA surcharge sought in the MOU. This surcharge is clearly an unreasonable and discriminatory rate, term and condition imposed on CLECs wishing to interconnect with the SWBT network. As discussed more fully below, SWBT's MCA surcharge contained in its MOU is not based upon SWBT's costs or provision of any service but, rather, is designed to replace revenue SWBT loses through competition in the marketplace.

C. SWBT'S Conduct Violates the Reciprocal Compensation Provisions of Section 252

Section 251(b)(5) establishes a duty upon each local exchange carrier "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 252(d)(2)(A) establishes that, for the purpose of compliance

with Section 251(b)(5), a "state Commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless -

> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier, and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

SWBT's attempt through its MOU to impose a competitive loss surcharge on CLECs, essentially stands the concept of reciprocal compensation contained in the Telecom Act on its head. Through the imposition of the $0.026 per minute competitive loss surcharge, CLECs find themselves paying SWBT for calls terminated by SWBT to the CLEC, even though it is the CLEC that is providing the termination function. Instead of being compensated for providing the termination function, the CLEC is forced to pay SWBT, and pay at a rate approximately five times that of the local compensation rate approved by the Commission. (Cadieux Direct, p. 29). As Mr. Cadieux notes, "it is difficult to imagine a scheme which would violate the FTA's reciprocal compensation requirements in a more fundamental manner than what SWBT is attempting through this surcharge." (Cadieux Direct pp. 29-30).

D. SWBT's Conduct Causes Dialing Disparity in Violation of Section 251

Section 251(a)(3) provides that each telecommunications carrier has the duty to:

> provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

Section 3(15) of the Telecom Act defines dialing parity as follows:

> the term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically without the use of any access code, to the telecommunications services provider of the customer's designation from among two or more telecommunications services providers (including such local exchange carriers).

In addition to these provisions of the Telecom Act, the FCC has enacted a number of rule provisions related to dialing parity. Specifically the FCC has provided that:

> A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call not withstanding the identity of the customer's or the called party's telecommunications service provider. 47 C.F.R. Section 51.207

SWBT's call screening tactics clearly violate these provisions. By programming its switches to treat calls from its own MCA subscribers to CLEC MCA subscribers as toll calls, SWBT imposes toll charges and one plus ten digit dialing based solely on the fact that the called party has selected a competitive local exchange carrier to provide service. SWBT's $0.026 competitive loss surcharge also violates these provisions as well. SWBT, via its MOU, is attempting to foist a surcharge on its competitors as a condition of SWBT's provision of local dialing parity, as though it were charging for a discretionary service. SWBT, however, is obligated under federal law to provide local dialing parity.

II. SWBT'S REFUSAL TO RECOGNIZE CLECS AS MCA PLAN PARTICIPANTS ONLY WITH RESPECT TO FACILITIES-BASED SERVICE IS EXTREMELY DISINGENUOUS, AS CLECS HAVE BEEN PROVIDING MCA SERVICE IN MISSOURI SINCE 1996.

A. SWBT Refuses to Recognize CLECs as MCA Participants Based On an Improper Interpretation of the Report and Order Establishing the MCA

The Report and Order requires all LECs (not just ILECs) operating within the geographic scope of the MCA to participate in the MCA plan: "The Commission concludes that LECs should implement these plans and the affected exchanges to provide efficient and adequate interexchange calling to their customers." (Report and Order p. 53) Although the Report and Order makes no specific reference to CLECs, the term LEC as it is commonly used today refers to both ILECs and CLECs. SWBT has disingenuously seized upon the Report and Order's understandable lack of specific reference to "CLECs" and has refused to recognize CLECs as proper participants in the MCA service plan. This unduly narrow interpretation of the Report and Order is squarely at odds with subsequent orders issued by the Commission.

B. The Commission Has Authorized CLEC Participation In The MCA In Numerous Other Orders Approving Interconnection Agreements and Tariffs

Subsequent to the Commission's issuance of the Report and Order, the Commission has approved numerous CLEC local exchange tariffs that offer MCA service. In Case No. TO-96-440, the Commission approved the interconnection agreement between SWBT and Cable-Laying Company d/b/a Dial US ("Dial US"). As to the issue raised in that case of CLECs offering MCA Service, 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) Subsequently, the Commission approved Dial US' tariffs, which offered mandatory and optional MCA service. Thus, to the extent that CLECs have interconnection agreements and tariffs approved by the Commission that allow them to offer MCA service, the Commission has already authorized CLEC participation in the MCA and has already recognized CLEC MCA customers as MCA subscribers. To hold otherwise creates a very uncertain regulatory

and competitive environment for CLECs wishing to offer service in MCA markets. No distinction is made in the applicable tariffs, or in any documentation submitted by SWBT, between facilities-based service and resold service, such that CLECs were provided any reasonable notice that SWBT would screen CLEC NXXs prior to the time SWBT actually began engaging in such conduct.

C. SWBT Never Objected to CLEC Participation In the MCA Until CLECs Began Offering Facilities-Based Service Which Posed a Threat to SWBT's Profits

SWBT did not oppose CLEC MCA participation in TO-96-440, or in conjunction with any tariffs that proposed CLEC provision of MCA service. Rather, SWBT has consistently "allowed" CLECs to participate in the MCA Plan with respect to the offering of resold service, UNE-P service, and in cases where the CLEC has ported a number from SWBT. (Hughes Testimony, Tr. 999-1000, 1009-11.) Until it suddenly began screening CLEC NXX codes, it was virtually a foregone conclusion that CLECs were, in fact, MCA plan participants. (Direct Testimony of R. Matthew Kohly, p. 9). Indeed the issue of CLEC MCA participation was never questioned by SWBT in any of the arbitration held pursuant to Section 252(b) of the Telecom Act. (Kohly Direct, p. 9). To the contrary, in one of the arbitration cases, SWBT's Executive Director, William C. Bailey, testified that SWBT was not attempting to keep competitors out of the MCA and was willing to allow CLECs to resell MCA service; the clear implication is that SWBT did recognize CLECs as MCA participants. (Case No. TO-97-40/TO-97-67, Transcript, p. 1444). If SWBT did not recognize CLECs as MCA participants at the time of Mr. Bailey's testimony, there certainly was no better time to voice this to the Commission than in response to Commissioner Drainer's questions then. Mr. Bailey's testimony here clearly contradicts SWBT's testimony in this proceeding

presented by Mr. Hughes, in which Mr. Hughes states that SWBT has "never considered CLECs to be MCA participants." (Hughes Testimony, Tr. p. 1008).

D. If SWBT's Narrow Interpretation of The Report and Order Establishing the MCA is Correct, The Report and Order Most Certainly Violates the Telecom Act as a Barrier to Entry.

As discussed above in Section I.A, Section 253(a) of the Telecom Act prohibits any regulation that has the effect of prohibiting the ability of any CLEC to offer any telecommunications service. As discussed further in that section, if CLECs are not recognized as MCA participants, they have no ability to offer competitive facilities-based services in MCA markets.

III. SWBT'S MOU IS NOT A GOOD FAITH "SOLUTION" ALLOWING CLEC ACCESS TO THE MCA AND SHOULD BE REJECTED ENTIRELY

A. SWBT's Proposed MOU is Neither Legal nor Economically Feasible

The compensation sought by SWBT in its proposed MOU is not appropriate for a number of reasons. As discussed above, SWBT's attempt to impose a 2.6 cents per minute "originating access charge" i.e., competitive loss surcharge on CLECs, violates the Telecom Act in a number of ways, namely the interconnection and dialing parity provisions of Section 251 and the reciprocal compensation provisions of Section 252 . SWBT clearly recognizes this violation, as manifested by its specific attempt to "exempt" the MOU from these provisions via language in the MOU. (Exhibit 33, Schedule 1) Additionally, as set forth in the testimony of McLeodUSA witness Martin Wissenberg, SWBT's proposed rate results in McLeodUSA's incurring of higher costs for providing facilities-based services, than for providing resale services. (Wissenberg Direct, pp. 11-14) Thus, the incentive to invest in the infrastructure necessary to provide facilities-based services is significantly reduced, if not

eliminated, for CLECs, like McLeodUSA, wishing to provide facilities-based services in MCA plan markets. Finally, and quite significantly, SWBT never sought approval from this Commission for the compensation sought in the MOU (either with respect to the nature of the compensation, i.e., an unprecedented originating access charge, or with respect to the rate charged). That SWBT would not attempt to do so is disturbing and also quite telling with respect to SWBT's motives and attitudes regarding competitive issues.

B. SWBT's MOU Surcharge is Not in Any Way Related to SWBT's Costs, and is Nothing More Than an Attempt By SWBT to Obtain Improper Revenue Replacement for Customers Lost Through Open Competition

SWBT's MOU charge of $0.026 per minute to terminate calls from SWBT's MCA subscribers to CLEC MCA plan subscribers represents SWBT's "toll" for recognizing CLECs as participants in the MCA plan. This charge, or, more appropriately, this "competitive loss surcharge" is nothing more than an improper revenue replacement ploy by SWBT to attempt to maintain its profit levels, even if CLECs are successful in winning over current SWBT customers in Missouri markets. (Voight Direct, pp. 44-45). The $0.026 charge, or any other charge SWBT would levy on CLECs to terminate SWBT customer calls to CLEC MCA subscribers is not based on any costs incurred by SWBT for allowing CLECs the "privilege" of participating in the MCA plan. SWBT incurs no such additional costs. (Hughes Testimony, Tr. pp. 966-67) Furthermore, the CLEC obtains no service from SWBT for the "surcharge," other than SWBT's promise to refrain from engaging in illegal, anti-competitive screening tactics that create dialing and rate disparity. (Hughes Testimony, Tr. pp. 965-66) As a result, the consideration for the surcharge is at best quite thin. The surcharge clearly is intended by SWBT to partially offset revenue which SWBT loses when an SWBT MCA plan subscribe decides to switch dial tone service to a different local service

provider. (Hughes Direct, p. 9) Thus, in return for being successful in the marketplace by winning a customer over from SWBT, the CLEC is required to pay a penalty to SWBT for such success. Such charges are neither proper nor justified. SWBT does not have the authority to act as the gatekeeper of the MCA and unilaterally levy an unapproved toll as a condition to CLEC MCA participation.

IV. SWBT'S WILLINGNESS TO CIRCUMVENT THE AUTHORITY OF THIS COMMISSION AND TO DISREGARD THE TELECOM ACT CREATES A VERY ANTI-COMPETITIVE AND UNCERTAIN ENVIRONMENT IN MISSOURI AND SHOULD BE PUNISHED

Perhaps even more problematic for CLECs than SWBT's screening of CLEC MCA prefixes and imposition of a competitive loss surcharge, is SWBT's demonstrated willingness to circumvent the authority of this Commission and to violate the Telecommunications Act.

When faced with what it perceived as a competitive issue, namely CLEC facilities-based participation in the MCA, SWBT did not seek a clarification of the Report and Order and did not otherwise take the issue to the Commission. Rather, SWBT unilaterally imposed a roadblock for CLECs attempting to offer facilities-based MCA service. Not only did SWBT fail to seek any kind of Commission approval for its call screening measures, but it failed to give any advanced notice of same. (Complaint of AT&T, Case No. TC-2000-15, p. 3)

Although SWBT began screening CLEC MCA prefixes in April of 1999, it was not until late December of that year that SWBT offered any kind of solution for CLECs wishing to engage in facilities-based competition in MCA markets. And that "solution" was merely the illegal and financially unattractive MOU. Throughout this time period McLeodUSA attempted on several occasions to obtain relief from SWBT's screening tactics and to

otherwise be recognized as an MCA plan participant, but was consistently told by SWBT that since it "was not an ILEC," it would not be recognized as an MCA plan participant. (Wissenberg Direct, pp. 7-8)

The Commission should sanction SWBT for its anti-competitive attempts to block CLEC facilities-based competition in the MCA by requiring SWBT to compensate CLECs for the difference between the CLEC's actual profits under resale, and what the CLEC would have made were it allowed to compete with facilities-based services during the time SWBT engaged in its call screening tactics. Such damages are neither speculative nor difficult to prove. Additionally, the Commission should take whatever steps necessary to prevent SWBT from unilaterally circumventing the Commission's authority in the future. For even though SWBT acknowledges and understands that it has no authority to act as the Gatekeeper of the MCA (Hughes, Tr. pp. 1015-16), that certainly did not stop them from trying.

V. COMMISSIONER DRAINER'S QUESTIONS

During the course of the hearing in this docket, Commissioner Drainer specifically requested that the parties brief the following questions:

A. Does The Commission Have the Authority to Override Existing Reciprocal Compensation Arrangements that are in Existing Interconnection Agreements and, if Not, Does The Commission Have the Authority to Mandate that all Future Interconnection Agreements Must be Based Only on Bill and Keep? (Transcripts of Proceedings p. 490).

A Commission mandate that bill and keep must be used exclusively as the method of intercompany compensation for MCA service would violate the intent of the Telecom Act, which states a clear preference for reciprocal compensation. Section 251(b)(5), which is contained in Part II of the Act entitled "Development of Competitive Markets," places a duty on every local exchange carrier "to establish reciprocal compensation

arrangement for the transport and termination of telecommunications." Although Section 252(d)(2)(B)(i) indicates that the requirements contained in Section 252(d)(2) do not preclude the use of bill and keep arrangements, the duty for LECs to establish reciprocal compensation arrangements is not minimized. Mandating that bill and keep be used exclusively in the future is squarely at odds with the interplay between 251(b)(5) and 252(d)(2)(B)(i). As noted by the FCC, "it is clear that the bill and keep arrangements may be imposed in the context of the arbitration process for termination of traffic, at least in some circumstances." (First Report and Order, CC Docket Nos. 96-98, 95-185, par. IIII). Thus, although the FCC has opened the door for the use of bill and keep as a possibility (upon presentation of proper evidence in an arbitration), a Commission mandate that bill and keep be used exclusively clearly violates the Telecom Act.

A further problem arises with respect to the question of a bill and keep mandate. Such a mandate would result in the invalidation and rewriting of portions of heavily negotiated interconnection agreements previously approved by the Commission. Not only is this bad public policy, but it flies in the face of long standing contract law principles.

1. Public Policy

Retroactively changing intercompany compensation provisions in negotiated and approved interconnection agreements sets a very bad precedent in general. It opens the door for future attempts (either on the a part of the Commission or individual parties) to rewrite virtually any other provision contained in an approved interconnection agreement. Such a situation would lead to great uncertainty with respect to future regulatory and contractual standards governing telecommunication competition in Missouri.

Additionally, individual provisions in interconnection agreements are not properly viewed as being negotiated in a vacuum. Specifically, with respect to reciprocal compensation provisions contained in an interconnection agreement, it is quite likely that the parties, in the course of negotiating such provisions, engaged in significant give and take with respect to other terms and conditions contained in the interconnection agreement. For example, in return for reciprocal compensation, a party may have agreed to various rates and terms to which it otherwise would not have agreed were bill and keep the method of intercompany compensation. If the Commission were to step in and retroactively mandate the use of bill and keep, this would create and adverse ripple affect on the efficacy of the remaining provisions of the interconnection agreement, and would subvert the entire interconnection agreement process.

2. Contract Law Principles

It is a well established and long-standing principle of law that courts (and administrative agencies) have an aversion toward rewriting contracts negotiated between two parties:

> If a contract is clear, definite and certain so that the intent of the parties can be spelled therefrom, then the provisions of the contract re binding and controlling and must be accepted "without reference to any rules of interpretation," as courts have no right to remake a contract between the parties into something other than what it clearly states and intends. H. K. Porter Company v. Wirerope Corp. of America, Inc., 367 F.2d 653,660 (8th Cir. 1966), *See also* McCarthy Bros. Construction Company v. Price, 832 F.2d 463,466-67 (8th Cir. 1987), Pitcairn v. American Refrigerator Transit Co., 101 F.2d 929 (8th Cir. 1939).

Likewise it is equally axiomatic that courts (and administrative agencies) are not free to remake contracts or imply provisions through judicial interpretation so as to save parties from what it believes are contractual mistakes or oversights. Towers Hotel Corp. v. Rimmel,

871 F.2d 766, 773 (8th Cir. 1989), In re Stevenson Associates, 777 F.2d 415, 421 (8th Cir. 1985), Morello v. Federal Barge Lines, Inc., 746 F.2d 1347, 1351 (8th Cir. 1984).

As required by the Telecom Act, SWBT and other ILECs have entered into various interconnection agreements with CLECs providing for reciprocal compensation. These agreements were heavily negotiated between the parties and were approved by this

Commission. The reciprocal compensation arrangements contained in these interconnection agreements were accepted, if not sought by, the ILECs, and were fine as long as the CLECs were participating in the MCA plan through offering resold or UNE-P services. These agreements do not contain any distinction between such forms of service and facilities-based service, and the fact that a CLEC is offering facilities-based service is not grounds to change or rewrite previously negotiated and approved interconnection agreements.

B. Does the Commission Have the Legal Authority to Direct the CLECs to Work Out Agreements With the Small ILECs, and if They Have Not, Can the Commission Instruct the Applicable Large ILEC to Block All Such Calls Between any CLEC and Small ILEC Who Have Not Worked Out Interconnection Agreements? (Transcript of Proceedings pp. 1145-46)

Although small ILECs (and all LECs) have the right to be compensated for the traffic they terminate, McLeodUSA is not aware of any authority for the Commission to require CLECs to interconnect with anyone as a condition to MCA participation or to anything else. Such a condition subverts the purpose of the interconnection provisions of the Telecom Act which were designed to benefit CLECs and foster competition. Such a condition is also unnecessary. In the absence of an interconnection agreement, bill and keep is to be the method of intercompany compensation utilized. If a bill and keep arrangement is in place, it is difficult to see how the small ILECs are at risk for having to terminate traffic

without compensation. Although McLeodUSA is willing to attempt to negotiate an interconnection agreement with any party with whom significant traffic is exchanged, the intrusive and time-consuming requirement of mandatory interconnection with all small ILECs participating in the MCA as a condition to McLeodUSA's participation, is not justified, especially given the evidence presented in this docket. At best MCA traffic from CLECs terminated to ILECs appears to be de minimis. If it is CLEC resale traffic that is the main concern of the small ILECs, that is a problem (to the extent one may really exist) that is the responsibility of SWBT, and it should not be foisted on the CLECS.

Ordering the blocking of traffic to force the execution of largely unnecessary interconnection agreements directly violates Section 253 of the Telecom Act by creating an impermissible barrier to entry for CLECs. Such a block on traffic also violates Section 392.200.6 RSMO which provides that:

> Every telecommunications company operating in this state shall receive, transmit and deliver, without discrimination or delay, the conversations and messages of every other telecommunications company with whose facilities a connection may have been made.

VI. CONCLUSION: THE ORDER THE COMMISSION SHOULD ENTER

As discussed above, CLECs have been participating in the MCA plan for several years by providing resold services under tariffs authorizing them to provide MCA service. The status quo throughout this time was that CLECs enjoyed pricing flexibility to offer MCA service at prices different from that offered by competing ILECs and, that reciprocal compensation was the method of intercompany compensation, if same was provided for in an approved interconnection agreement. If reciprocal compensation was not provided for in an applicable interconnection agreement, bill and keep was utilized. The

mere fact that a CLEC is offering facilities-based service, as opposed to resold or UNE-P service, should not change this status quo. The evidence presented in this proceeding does not suggest otherwise.

SWBT and certain other ILECs are now advocating that the Commission enter an order requiring CLECs to abide by the same terms and conditions the Report and Order imposes upon ILECs. Such an order would terminate the current pricing flexibility enjoyed by CLECs and require CLECs to use bill and keep intercompany compensation. Thus SWBT, who for months excluded McLeodUSA from facilities-based participation in the MCA on the grounds that McLeodUSA was "not an ILEC" amazingly now wants to treat McLeodUSA exactly like an ILEC. What an interesting turn of events this presents. SWBT unilaterally engages in call screening tactics that significantly violate the Telecommunications Act and that are not improved by the Commission. When CLECs complain, they are put on hold by SWBT for months and then finally offered an MOU which also violates the Telecommunications Act, is also not approved by the Commission. Additionally the MOU imposes a competitive loss surcharge, and creates a financial disincentive for CLECs to offer facilities-based services in Missouri. Thus, hopes SWBT, with fingers crossed (behind its back no doubt) that when the Commission finally issues its order, the Commission will significantly limit the terms and conditions of CLEC MCA plan participation previously enjoyed by CLECs. Such then would be the penalty, apparently, for complaining about ILEC conduct that violates the Telecom Act and circumvents the authority of this Commission.

It is also interesting to note that if SWBT and the other ILECs get their wish and an order is entered "reaffirming" CLEC MCA plan participation, but only under the precise

terms and conditions of the existing Report and Order, CLECs will have been delayed over 9 months from the date they proposed a non-unanimous stipulation in this docket whereby CLECs were seeking interim relief on the same terms as the Report and Order, pending the outcome of this docket. Interestingly, and quite tellingly, CLEC participation in the MCA on the precise terms of the Report and Order was not adequate at the time the non-unanimous stipulation was circulated months ago (SWBT was virtually the only party who objected to same), but apparently now is (now that SWBT has succeeded in delaying CLEC facilities-based entry into Missouri MCA markets for more than a year).

The issue of whether CLECs were to be considered LECs with respect to the interpretation of the Commission's Report and Order, and the issue of whether the current MCA plan is a barrier to entry to CLECs, was first brought before the Commission in March 1998 in case no. TO-98-379. These and other issues relating to the MCA plan were again reiterated to the Commission in April of 1999 with the filing by staff of case no. TO-99-483. SWBT's improper and anti-competitive screening tactics regarding CLEC NXXs were first brought to the attention of the Commission in July 1999 by AT&T in Case No. TO-2000-15. Since that date several attempts have been made by CLECs to obtain interim or expedited relief.

The Commission should immediately enter an order:

a) reaffirming that properly certified and tariffed CLECs may provide facilities-based services in the geographical area covered by the MCA plan:

b) maintaining pricing flexibility;

c) providing flexibility to expand the geographic scope of the MCA (provided switched access charges apply);

d) setting intercompany compensation in accordance with existing interconnection agreements, with bill and keep utilized in the absence of same;

e) requiring that SWBT should immediately cease and desist from any and all of its call screening tactics and directing that SWBT and other ILECs immediately recognize CLECs offering facilities-based MCA service as participants in the MCA;

f) declaring SWBT's MOU invalid and void;

g) sanctioning SWBT for its unilateral conduct in circumventing the Commission's authority by unilaterally engaging in call screening procedures and proposing its MOU; and

h) implementing such procedures as the Commission sees fit to ensure that in the future SWBT and other ILECs do not engage in such unauthorized and improper conduct.

Respectfully submitted,

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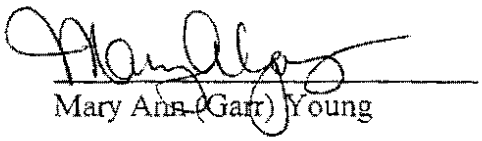
CERTIFICATE OF SERVICE

I hereby certify that a copy of this document 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 30th day of June 2000.



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