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November 9, 2001

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

FILED³

NOV 09 2001

Missouri Public
Service Commission

Re: Case No. TO-2001-467

Dear Judge Roberts:

Enclosed for filing please find an original and eight (8) copies of Missouri Independent Telephone Company Group's Initial Brief in the above-referenced case.

Thank you for seeing this filed.

Sincerely,

Lisa Cole Chase
Lisa Cole Chase

LCC:tr

Enc.

cc: MITG Managers
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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Public
Service Commission

In the Matter of the Investigation of the)
State of Competition in the Exchanges of) Case No. TO-2001-467
Southwestern Bell Telephone Company)

MISSOURI INDEPENDENT TELEPHONE COMPANY GROUP'S
INITIAL BRIEF

Comes now the Missouri Independent Telephone Company Group (MITG) and files it's initial brief in opposition to granting Southwestern Bell Telephone Company (SWBT) competitive status for its Local Plus service, and defers to this Commission's determination in SWBT's current tariff proceeding TT-2002-108 as to the competitive status of SWBT's Optional MCA service.

Local Plus

SWBT's Local Plus Service should not be classified as competitive in any exchange until and unless there is a final resolution of the issues contained in SWBT's appeal of the Commission's Order in TO-2000-667.¹ In that docket, the Commission found that SWBT had not made Local Plus and its local dialing pattern functionality fully available for resale at a uniform discount pursuant to the Commission's earlier Order in Case No. TT-98-351.²

When the Commission set out the conditions under which SWBT would be permitted to offer Local Plus, it recognized that Local Plus was a unique service—a hybrid of toll and local service-- and imposed certain requirements on SWBT to assure Local Plus was not anti-

¹ *In the Matter of the Investigation into the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus Services by Interexchange Companies and Facilities-Based Competitive Local Exchange Companies*, Case No. TO-2000-667, Report and Order issued May 1, 2001.

competitive. In its Report and Order in TO-2000-667 the Commission found SWBT was engaging in an anti-competitive manner by failing to abide by the original requirements, and directed SWBT to correct its anti-competitive behavior.³

² *In the Matter of Southwestern Bell Telephone company's Tariff Revisions Designed to Introduce a LATA-wide Extended Area Service (EAS) Called Local Plus, and a One-Way COS Plan*, Case No. TT-98-351, Report and Order issued September 17, 1998.

³ In its Report and Order at pp. 7-14, the Commission stated:

..."When the Commission set out the conditions under which SWBT would be permitted to offer Local Plus, it recognized that Local Plus was a unique hybrid service and imposed certain requirements on SWBT. The companies that sought to serve local phone customers in competition with SWBT were concerned that SWBT would offer Local Plus at a rate below its actual costs, particularly with regard to the imputed cost of terminating access, thus making it impossible for other carriers to effectively compete with SWBT. The Commission chose not to attempt to impute access charges on the cost of provisioning of Local Plus. Instead the Commission found that imputation of access charges would not be necessary if this type of service was made available for resale at the wholesale discount to CLECs and IXC's. Specifically, the Commission found that '[I]n order to enable customers to obtain this type of service by using the same dialing pattern, the dialing pattern functionality should be made available for purchase to IXC's and CLECs on both a resale and unbundled network element basis.' [footnote omitted] If SWBT were required to make Local Plus freely available for resale the risk that predatory pricing would endanger competition would be reduced....

...SWBT denies that it has an obligation to permit resale of Local Plus by CLECs or IXC's that provide service to a customer through the purchase of UNE's or through the provider's separate facilities. Indeed, SWBT argues that "resale" is by definition impossible in such a situation.

SWBT bases its argument on the distinction made in the Telecommunications Act of 1996 between resale of services and provision of service through UNEs or separate facilities. SWBT suggests that, by definition, a company providing certain services through purchase of UNE's, or through its own facilities, cannot also resell those services. Of course, such distinctions do exist, but they are not particularly relevant in this situation.

The Commission is not concerned with placing particular services and providers within a particular box. Instead, the Commission wants to assure that Local Plus is made available to Missouri consumers, without stifling competition for the local telephone market.... Local Plus has the potential to stifle competition because of SWBT's dominant position in the marketplace....

Because it does not have to pay terminating access on a larger percentage of Local Plus calls than would any of its potential competitors, SWBT can potentially price its Local Plus service at a level that cannot be matched by its competitors; and potentially lower than its actual cost of providing that service. For that reason the Commission, in Case No. TT-98-351, required SWBT to make Local Plus available for resale by its competitors. If Local Plus can be resold by SWBT's competitors at an appropriate wholesale discount, the risk of anti-competitive effects from Local Plus is eliminated....

The Commission Ordered:

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

Case No. TO-2002-667 at pp. 14-15.

Furthermore, this Commission has specifically found that as a result of SWBT not fulfilling "its obligations to make Local Plus available for resale by all of its competitors[, ...] those companies seeking to compete against SWBT in the Basic Local Service market through

...SWBT's position of allowing resale only by pure resellers would result in Local Plus potentially being used as an anti-competitive barrier for SWBT's UNE and facility-based competitors. ...

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

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

the use of their own facilities, or through the use of unbundled network elements, have been placed at a competitive disadvantage. That disadvantage has continued for nearly three years.”⁴

The Commission clearly found that SWBT has not complied with its Local Plus Order in TT-98-351. The Commission’s finding also indicates that Local Plus has been anti-competitive for CLECs and IXC’s that provide services through the purchase of UNE’s or through their own facilities. SWBT has appealed this Commission’s decision on Local Plus. If SWBT is successful in its appeal, the conditions initially established by this Commission in TT-98-351 and restated and reinforced in TO-2000-667 permitting SWBT to provide Local Plus will no longer be in place. The public and telecommunications industry will have no insurance against the risk of predatory pricing that would endanger competition. The competitive status of Local Plus remains uncertain until SWBT’s appeal is final, the Commission determines that SWBT is in compliance with its Orders in TT-98-351 and TO-2000-667, if not overruled, and that effective competition in the hybrid local/intra-LATA toll market exists.

MCA

SWBT filed a tariff sheet to implement a promotion that would discount optional Metropolitan Calling Area (MCA) service rates by offering reductions pursuant to term contracts signed by business customers.⁵ This tariff was suspended for concerns of anti-competitive effects for basic local traffic and IntraLATA toll traffic. A hearing was recently held. The MITG urges this Commission to postpone its determination of the competitive status of Optional MCA until this Commission has rendered its decision in Case No. TT-2002-108.

⁴ *In the Matter of the Investigation into the Effective Availability for Resale of Southwestern Bell Telephone Company’s Local Plus Services by Interexchange Companies and Facilities-Based Competitive Local Exchange Companies*, Case No. TO-2000-667, Order Denying Application for Rehearing issued May 31, 2001, at p. 2.

⁵ *In the Matter of Southwestern Bell Telephone Company’s Tariff Filing to Initiate a Business MCA Promotion*, Case No. TT-2002-108, Tariff No. 200200051.

WHEREFORE, the MITG requests that this Commission determine SWBT for Local
Plus and Optional MCA services are not competitive at this time.

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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 9th day of November, 2001, to all attorneys of record.

Lisa Chase
Lisa Chase Mo. Bar No. 51502