

**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
Provisioning of Metropolitan Calling Area
Service after the Passage and Implementation
of the Telecommunications Act of 1996**

Case No. TO-99-483

BRIEF OF BIRCH TELECOM OF MISSOURI, INC.

COMES NOW Birch Telecom of Missouri, Inc. ("Birch") and for its Brief states as follows:

Introduction

The fundamental issue in this case is simple: should all local exchange carriers ("LECs") be permitted to participate in the Metropolitan Calling Area ("MCA") Plan, or is the MCA Plan designed to be offered only to customers of the incumbent LECs ("ILECs") that were in business when the MCA Plan was created in Case No. TO-92-306? As things stand today, competitive LECs ("CLECs") are being denied participation in the MCA Plan. While CLECs are free to offer their customers outbound local calling scopes as broad as the MCA, they can only do so by paying access charges or other negotiated reciprocal compensation to the terminating carriers. More importantly, CLEC customers in optional MCA tiers are being denied the ability to receive toll-free MCA calls from ILEC callers. Until ILECs are ordered to recognize CLEC NXXs as MCA NXXs, consumers will be left with the choice between remaining with their ILEC provider with the right to receive toll-free calls from their friends and customers who participate in the MCA or switching to a CLEC and losing the toll-free inbound calling feature.

This discrepancy between ILECs and CLECs results in a lack of true competition. Because ILECs are not currently able to program their switches to recognize telephone numbers that have been ported to a CLEC, CLECs that only resell ILEC service or use the Unbundled

1 Network Element platform ("UNE-P") to provide service are not affected by the current state of
2 affairs. Thus, until the Public Service Commission (the "Commission") acts to open the MCA to
3 all LECs (CLECs and ILECs), the incentive is for CLECs to provide only resale and UNE-P
4 service and not to use their own switches. Rather than creating an environment where LECs are
5 in head-to-head competition, with price and service providing incentives for consumers to pick
6 the best provider, the current treatment of the MCA Plan leaves CLECs with fewer than all the
7 options available to ILECs and forces CLECs not to provide the innovative, technologically
8 advanced alternatives that true competition would encourage.

9 **Analysis of Issues**

10 On April 11, 2000, the Staff of the Commission filed a List of Issues containing ten
11 issues determined by the parties to this case as being relevant for determination by the
12 Commission. At the hearing held from May 15-19, 2000, Commissioner Drainer added two
13 issues that were to be added to the parties' briefs. This brief will deal with those twelve issues in
14 turn.

15 **1. Are CLECs currently included in the MCA Plan and, if not, should CLECs be** 16 **permitted/required to participate in the MCA Plan?**

17 CLECs are currently not being allowed to participate in the MCA Plan. Under the MCA
18 Plan, as ordered in Case No. TO-92-306, a new local calling scope was established for customers
19 in the mandatory (Central, Zone 1, Zone 2) and three optional (Zones 3, 4, and 5)¹ tiers of what
20 are defined as the Kansas City, St. Louis, and Springfield MCAs. All customers in the
21 mandatory tiers participate in the MCA. Customers in the optional tiers must elect to participate
22 in the MCA, in which case they are charged a monthly additive. All MCA subscribers can call
23 all numbers in the mandatory tiers on a toll-free basis. Similarly, subscribers in any tier except
24 Zone 5 can call all numbers in their own tier and all tiers inside their tier and MCA subscribers in
25 any tier outside their own tier as a local call. Subscribers in Zone 5 can call any MCA subscriber
26 in Zone 5 and any number in any other tier on a toll-free basis.² By subscribing to the MCA,

¹ In Springfield the mandatory tiers are Central and Zone 1, and the optional tier is Zone 2. There are no additional zones in Springfield.

² See Direct Testimony of Voight at pp. 27-28.

1 customers thus not only buy the right to make toll-free outbound calls, but their numbers become
2 accessible to toll-free in-bound calling from other MCA subscribers.

3 Because of the position taken by Southwestern Bell Telephone Company ("SWBT"),
4 however, CLECs are not currently permitted to participate in the MCA Plan. Gabriel
5 Communications, Inc.'s witness, Edward J. Cadieux, summarized the current situation clearly in
6 his direct testimony:

7 In a nutshell, SWBT has taken the position that calls from its customers within the inner
8 zones of an MCA to the customers of its competitors located in the outer zones of that
9 same MCA will not be processed as local calls—instead, in those situations SWBT will
10 only process the call on a toll basis (i.e., the call must be dialed using 1+ ten digits, and
11 SWBT bills the call as a toll call to its customer).³

12 The primary adverse effect of SWBT's position is that a customer in an optional tier that
13 switches its service from an ILEC to a CLEC and receives a CLEC NXX⁴ loses the MCA
14 participant status necessary to receive calls on a toll-free basis from customers that have
15 remained with the ILECs. For commercial customers especially, this provides a heavy
16 disincentive to change to a CLEC provider. SWBT's Position Statement filed in this case
17 indicates that SWBT believes its position to be consistent with the order in Case No. TO-92-
18 306.⁵ Absent a Commission order clarifying or modifying the MCA Plan in this case, there is no
19 reason to believe SWBT will retract its position.

20 Given the importance of the MCA Plan to consumers and the heavy burden on
21 competition and technological advancement imposed by SWBT's denial of CLEC participation
22 in the MCA, CLECs must be permitted to participate in the MCA Plan. No witness at the
23 hearing in this case or in written testimony has disputed the importance of the MCA Plan to
24 consumers. Similarly, no witness presented evidence that in any way undercuts the proposition
25 that CLECs are placed at a competitive disadvantage by being denied the right to participate in
26 this Commission-mandated calling plan. The only real questions for the Commission to consider

³ Direct Testimony of Cadieux at p. 10.

⁴ The ILEC's switch determines whether the called party is an MCA participant by comparing the called party's NXX to a list of MCA NXXs. Where a CLEC merely ports an ILEC number (as a reseller of UNE-P provider), the customer's number does not change, and the ILEC's switch continues to treat the number as an MCA number.

⁵ See, SWBT Position Statement at p. 1.

1 in drafting its order in this case deal with how, not whether, to permit CLEC participation in the
2 MCA Plan.

3 **2. If permitted to participate in the MCA Plan, should CLECs be required to follow**
4 **the parameters of the MCA Plan with regard to (a) geographic calling scope, (b) bill and**
5 **keep intercompany compensation, (c) use of segregated NXXs for MCA service, and (d)**
6 **price?**

7 This issue goes to the heart of the matter. Phrased another way, the question is how
8 precisely must CLECs adhere to the terms and conditions imposed on the original parties to Case
9 No. TO-92-306 in order to participate in the MCA Plan? In dealing with the subpoints under this
10 issue, the Commission must bear in mind the fundamental difference between **competitive local**
11 **exchange carriers** and **incumbent local exchange carriers**. Until 1996 the ILECs enjoyed an
12 absolute monopoly in their respective service areas. Since the advent of local competition, the
13 large ILECs have faced the beginnings of competition, but they remain in a near-monopoly
14 position and, so, continue to be subject to rate regulation. CLECs, on the other hand, have been
15 classified by the Commission as competitive carriers. By definition, they do not have market
16 power. When they offer service as good or better than the ILECs they compete with at prices as
17 low or lower than those offered by the ILECs, CLECs have the potential to win customers from
18 the incumbents. That potential would be greatly restricted by permitting CLECs to participate in
19 the MCA Plan only by offering MCA service at the same price as the ILECs. With respect to a
20 calling plan deemed so important--indeed, expected--by consumers, this distinction in terms of
21 market power and competitive classification should not be overlooked.

22 The most important area where CLECs should be free from a literal adherence to the
23 terms of the MCA Plan as it applies to ILECs is price. The freedom to set prices is the hallmark
24 of a competitive LEC. Missouri's legislature has codified this difference between competitive
25 and incumbent LECs in, among other places, RSMo. § 351.245, which applies maximum price
26 regulation only to incumbents. While CLECs are required to submit their tariffs for approval by
27 the Commission, the only CLEC rates that are subject to price-cap regulation are rates for
28 switched access. In fact, the way CLEC access rates are capped gives further evidence of the

1 foundational nature of the premise that CLEC rates must be determined by competitive
2 conditions—the cap is not applied by statute or by rule, but by the terms of the standard
3 stipulation entered into by and among the parties to each new CLEC’s basic local exchange
4 application proceeding. Thus, the only price caps applicable to CLECs in Missouri are
5 contractually determined. If the Commission were to mandate that CLECs offer MCA service at
6 the prices fixed for ILECs, the Commission would be overturning a fundamental tenet of
7 competition.

8 The parties seem to be less strongly divided on the other three subpoints contained in this
9 issue. The testimony at the hearing from a number of witnesses indicated that the establishment
10 of outbound calling scopes broader than the MCA, as long as they are denominated as a distinct
11 service (such as SWBT’s Local Plus service), is not inconsistent with the MCA Plan.⁶ The
12 witnesses were even closer to unanimity on the necessity to continue to use segregated NXXs to
13 allow switches to distinguish between MCA and non-MCA subscribers. Of these three points,
14 only the question of bill and keep intercompany compensation appears to be seriously in dispute.

15 Bill and keep intercompany compensation is the rule under Case No. TO-92-306 and
16 should be retained, at least as a default or fall-back provision, when the Commission issues its
17 order in this case. The premise of the MCA Plan is that traffic should flow between companies
18 and customers as local traffic. Bill and keep presumes that the average flow of traffic will
19 remain approximately equal in both directions, so there is no need for either the originating or
20 the terminating LEC to track or pay for the exchange of traffic. As a number of parties have
21 suggested,⁷ parties should be free to negotiate separate reciprocal compensation agreements to
22 deal with traffic imbalances, but the bill and keep standard should apply in the absence of such a
23 negotiated agreement. Obviously, permitting companies to negotiate reciprocal compensation
24 arrangements would vary the terms of the existing MCA Plan, but it would not favor either
25 ILECs or CLECs.

⁶ This disregards Staff’s MCA-2 plan, which the parties seem to have agreed goes beyond the scope of this proceeding and should be developed more fully in a later case devoted to making any necessary changes to the MCA Plan.

⁷ See, e.g., Direct Testimony of Cadieux at p. 44; Direct Testimony of Kohly at p. 33.

1 **3. Should there be any restrictions on the MCA Plan (for example, resale,**
2 **payphones, wireless, internet access, etc.)?**

3 The little evidence presented in this case on this topic has not demonstrated that any
4 restrictions are necessary.

5 **4. What pricing flexibility should ILECs and/or CLECs have under the MCA Plan?**

6 As discussed under Issue 2, above, the evidence presented in this case does not indicate
7 either that the MCA Plan is a special case where ILECs should be free to set non-cost justified
8 prices or that the MCA Plan is a special case where CLECs should be required to set prices based
9 on anything other than competitive pressures.

10 **5. How should MCA codes be administered?**

11 If bill and keep is the default provision, the need for a central codes administrator is
12 negligible, but the proposal advanced by Mr. Cadieux at the hearing⁸ would be a good method
13 for identifying MCA codes. Mr. Cadieux suggested that each LEC be required to submit a
14 verified list of MCA and non-MCA codes to the Commission and to every other LEC involved in
15 the MCA Plan. This proposal would keep all LECs up to speed on the existing MCA NXXs, so
16 they would be able to program their switches accordingly. The proposal is both simple enough
17 to avoid the need for a separate administrator and powerful enough to be enforceable by ordinary
18 complaint procedures. If the Commission does see the need for an administrator, the
19 administrator should be a third party, unaffiliated in any way with any of the LECs.

20 **6. What is the appropriate intercompany compensation between LECs providing**
21 **MCA service?**

22 As discussed under Issue 2, above, bill and keep should be the default intercompany
23 compensation mechanism, with the parties free to reach negotiated reciprocal compensation
24 arrangements.

25 **7. Is the compensation sought in the proposed MOU appropriate?**

26 The compensation sought by SWBT in the proposed Memorandum of Understanding (the
27 "MOU") with Intermedia Communications, Inc. ("Intermedia") is not appropriate. Under the

⁸ See Hearing Transcript at pp. 828-29.

1 MOU, Intermedia agreed to pay SWBT a fee of \$.026 per minute for Intermedia's customers to
2 be able to receive in-bound local calls from SWBT MCA customers. Thomas F. Hughes, a
3 witness for SWBT, explained the charge in the MOU as follows: "In the [MOU] with
4 Intermedia, SWBT agreed not to assess otherwise applicable toll charges in return for a payment
5 of 2.6 cents per minute. This is based on SWBT's intrastate originating access charges, which
6 would be the minimum loss SWBT would incur in not treating the call as toll."⁹ SWBT's
7 rationale flows from a flawed supposition. SWBT is apparently assuming that the CLEC's
8 customers were originally not MCA participants. CLEC customers all began as ILEC customers.
9 It seems reasonable to assume that customers that elect to buy MCA service from a CLEC were
10 MCA participants before they switched providers. While those customers were MCA
11 participants, SWBT was required by the terms of the MCA Plan to treat calls to those customers
12 on a local basis with bill and keep intercompany compensation. When the customers switched
13 from their ILEC to a CLEC, the only reason SWBT was able to begin charging its customers toll
14 rates for calling the new CLEC customers was that SWBT chose not to allow CLECs to
15 participate in the MCA. Thus, the only "loss" SWBT can point to is derived from revenues that
16 did not exist before CLECs entered the picture, won customers from ILECs, and were denied
17 participation in the MCA. Any per-minute charge assessed by SWBT on CLECs for the right to
18 participate in the MCA are *per se* unreasonable.

19 **8. Should the MCA Plan be retained as is, modified (such as Staff's MCA-2**
20 **proposal), or eliminated?**

21 Based on the testimony of a number of witnesses at the hearing, the parties appear to be
22 in relative agreement that Staff's MCA-2 proposal should be taken up, if at all, in a separate case
23 focused on the question of whether any fundamental changes should be made to the MCA Plan.
24 As outlined above, however, the MCA Plan should be changed in the order arising out of this
25 case to the extent necessary to provide for CLEC participation with the freedom to set prices
26 competitively.

⁹ Rebuttal Testimony of Hughes at p. 11.

1 **9. If the current MCA Plan is modified, are ILECs entitled to revenue neutrality?**
2 **If so, what are the components of revenue neutrality and what rate design should be**
3 **adopted to provide for revenue neutrality?**

4 Revenue neutrality is one of the issues that should be addressed, if at all, in a subsequent
5 case. The only “revenue neutrality” that should be allowed would be to re-calculate the price of
6 MCA service, based on cost studies submitted by the ILECs, in accordance with the TELRIC
7 methodology.

8 **10. Should MCA traffic be tracked and recorded and, if so, how?**

9 As discussed under Issues 2 and 5, above, tracking and recording of MCA traffic should
10 be unnecessary if bill and keep is the default intercompany compensation mechanism. All LECs
11 in the MCAs should be required to send verified lists of MCA and non-MCA NXXs to one
12 another so that switches can be programmed properly to know which calls are treated locally and
13 which are treated as toll calls.

14 **11. Does the Commission have authority to order CLECs to enter into**
15 **Interconnection Agreements with small ILECs? If so, can the Commission order ILECs to**
16 **block calls from CLECs to the small ILECs until such Interconnection Agreements are in**
17 **place?**

18 **12. Does the Commission have the authority to override existing Interconnection**
19 **Agreements and to require bill and keep as the only permissible method of intercompany**
20 **compensation?**

21 These two issues are closely related. The Commission has the authority under 47 U.S.C.
22 § 252(e) to approve or reject Interconnection Agreements; moreover, § 252(e)(1) expressly
23 requires Interconnection Agreements to be submitted for approval to the Commission before they
24 can become operative. This statute, however, presupposes that the parties to the Interconnection
25 Agreement have reached an agreement. Nothing in this statute requires LECs to enter into
26 negotiations to establish Interconnection Agreements.¹⁰ The power to approve or disapprove

¹⁰ 47 U.S.C. § 251(c)(2) does require ILECs to provide for interconnection with a requesting LEC, but this duty does not extend to CLECs.

1 contracts is not the power to require companies to enter into contracts in the first instance. This
2 absence of an express grant of power applies equally to the question of whether the Commission
3 can re-open approved Interconnection Agreements to change the terms that are contained in
4 them. If the parties to an approved Interconnection Agreement do not seek Commission
5 approval of an amendment, the Commission has not been granted the power to amend the
6 Agreement on its own motion.

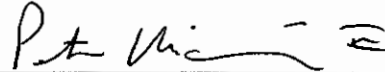
7 An important question to ask is whether the Commission should attempt to order CLECs
8 to enter into Interconnection Agreements with small ILECs. Until CLECs are granted authority
9 to provide service in small ILEC exchanges, the need for interconnection is absent. More
10 importantly, the Missouri legislature has adopted a statute that expressly requires LECs, leaving
11 aside the question of whether they have Interconnection Agreements with one another, to carry
12 one another's calls. RSMo. § 392.200.6 requires every telecommunications company operating
13 in Missouri to "receive, transmit, and deliver, without discrimination or delay, the conversations
14 and messages of every other telecommunications company with whose facilities a connection
15 may have been made." Thus, when a CLEC originates a call (for example, a toll call) to an end
16 user in a small ILEC's exchange, the call may travel over a large ILEC's facilities to the CLEC's
17 switch, back onto the large ILEC's facilities to the small ILEC's facilities, and finally to the end
18 user. Neither the large ILEC nor the small ILEC has the legal right to fail to transmit or
19 terminate that call. The small ILEC's access tariff, which is on file with the Commission and has
20 the force of law, governs the terminating access fee owed by the originating CLEC. There is no
21 need for the CLEC and the small ILEC to have an Interconnection Agreement separately
22 specifying the terms of their relationship; § 392.200.6 and the small ILEC's tariff already contain
23 all the necessary terms.

24 Section 392.200.6 should also be sufficient answer to the question of the Commission's
25 authority to order certain calls to be blocked. Without overturning the statute, such an order by
26 the Commission would be unlawful.

WHEREFORE, Birch Telecom of Missouri, Inc. respectfully requests that the Commission accept the foregoing as Birch's Brief in this case.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP

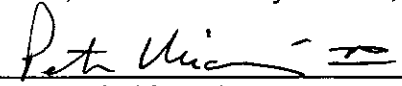


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been served via U.S. mail, facsimile, or electronically on the persons listed below, on this 30th day of June, 2000.


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