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

INITIAL BRIEF OF INTERVENOR INTERMEDIA COMMUNICATIONS INC.

INTRODUCTION

This case presents a myriad of complex issues, some which require an immediate Commission decision, some of which do not, at least not necessarily at this time. The *fundamental* issue before the Commission, however, is whether *a customer* should be permitted to continue receiving Metropolitan Calling Area ("MCA") service once that customer switches his or her basic local service provider. Most, if not all, parties to the case appear to agree that competitive local exchange companies ("CLECs") should be allowed to participate in the MCA plan and offer MCA service. Customers demand the service. CLECs wish to offer the service. Competition in the local market cannot truly exist without it.

Unfortunately, at the present time MCA service is not widely available to CLEC customers due to the unilateral MCA call screening actions taken by Southwestern Bell Telephone Company ("SWBT") and its ongoing refusal to recognize CLECs as MCA plan participants. An integral part of the overall MCA plan *for all customers* is the toll-free return calling feature. With one notable exception, SWBT currently provides toll-free return calling to *its* MCA customers but only if those customers do not attempt to call CLEC customers. Without

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prompt remedial action by this Commission in this case, CLEC customers will continue to be denied the full benefits of MCA service and SWBT's own existing customers will be denied toll-free return calling when they attempt to call customers of a CLEC.

Intervenor Intermedia Communications Inc.'s ("Intermedia's") position in this proceeding is somewhat unique. Unlike all the other CLEC parties to this case, it is an uncontested fact that Intermedia *is* currently offering "pure" MCA service to customers in the St. Louis area. SWBT's own witness admitted that SWBT now views Intermedia to be "a full participant in the MCA" plan. (Hughes, Tr. p. 1013, lines 19-21). This is so despite all SWBT's verbal gymnastics over the supposed difference between "customers" and "subscribers" to support its refusal to allow CLEC participation generally (Hughes, Tr. p. 1012-1013), and regardless of the parties' differing views as to whether the Commission's act of approving a CLEC's certificate and tariffs constitutes authorization for CLECs to participate in the MCA plan (Kohly, Tr. p. 411-414).

Suffice it to say that Intermedia's participation in the MCA plan, according to SWBT, was only made possible by Intermedia's execution of the draconian SWBT Memorandum of Understanding ("MOU") (Ex. 1, Voight Direct, Schedule 6-1), discussed in more detail below, which was executed under SWBT's threat to retranslate Intermedia's existing NXXs from local to toll in the spring of 1999. (Ex. 14, Mellon Rebuttal, pp. 5, 8-10). In order to be recognized as a full MCA plan participant by SWBT, SWBT required Intermedia, among other things, to pay SWBT an additional 2.6 cents per minute of use in order for SWBT to permit its own customers to make *any* toll-free return calls to Intermedia's customers--a requirement which clearly was not part of the Commission's approved MCA plan and which heretofore has never been required of any other LEC MCA plan participant. Moreover, the uncontested evidence shows that

Intermedia was required under the terms of SWBT's MOU to raise Intermedia's then-existing rates to its customers. (Ex. 1, Voight Direct, pp.38-39; Ex. 14, Mellon Rebuttal, p.11, line 17-18).

It is not, therefore, a question of *should* or even *can* a CLEC provide MCA service; Intermedia is already doing it. (Tr. 85). The real question is rather what terms and conditions should govern a CLECs' provision of such service and whether it should be SWBT or this Commission who makes that determination. To that end, the parties have offered various proposals for the Commission's consideration. Intermedia fully supports on a going forward basis the six "changes or clarifications" to the MCA plan proposed by AT&T. (Kohly Direct, Ex. 11, p. 29, lines 1-14). While for the most part Intermedia concurs with the Staff's basic analysis of the various issues presented, Intermedia joins with most other parties in suggesting that the Staff's "MCA 2" proposal requires additional study and that such a proposal--perhaps along with the other more complex issues relating to inter-company billing records and ILEC revenue neutrality/pricing flexibility--would best be addressed in another, separate case (or perhaps cases) created for that purpose. The immediate entry of CLECs generally into the existing MCA plan, however, should not be further delayed and the Commission in its order should reaffirm its intent that CLECs have been and are entitled to participate in the MCA plan.

Intermedia strongly opposes SWBT's proposal that Intermedia and other CLECs should be subject to the terms of SWBT's MOU as a condition of MCA plan participation. It is important to note that of all the other parties (including the other ILECs) only SWBT is urging modification of the Commission-approved MCA plan to include a 2.6 cents per minute charge be imposed on the CLECs as a prerequisite for CLEC participation. The Commission should

find, based on the record, that SWBT's unilaterally imposed MOU does not provide the appropriate framework to govern future CLEC participation in the MCA plan.

As discussed more fully below, Intermedia has more than a mere theoretical problem with SWBT's MOU that is driving its request for prompt Commission action in this case. Intermedia urges the Commission to issue its final order in this case specifically rejecting and overturning outright SWBT's MOU as not being in the public interest, contrary to the terms of the MCA plan as currently constituted, and otherwise void since SWBT refused to submit the MOU to the Commission for prior approval. It should be this Commission, not SWBT, who determines the terms of CLEC participation in the MCA plan. Intermedia asks that the Commission recognize the urgency of the unique, Intermedia-specific situation created by the patently unfair terms of the SWBT MOU and that the Commission issue its final order in this case well prior to the November 5, 2000 deadline unilaterally established by SWBT in its MOU.

Because Intermedia does not wish to unnecessarily duplicate what it anticipates the other parties will be adequately addressing in their initial briefs, especially the other CLEC parties, Intermedia in its initial brief will focus only on: 1) the issues raised by Vice Chair Drainer during the hearing; and 2) the issues specifically surrounding SWBT's MOU. To the extent additional response to matters raised in the other parties' initial briefs is required from Intermedia, it will do so in its Reply Brief and therewith will provide Intermedia's suggested findings of fact and conclusions of law as requested by Judge Dippell.

I. RESPONSE TO VICE CHAIR DRAINER'S QUESTIONS

At several points during the hearing, Vice Chair Drainer asked the parties to address certain questions which were not included in the issues list presented by the parties and which

were not, therefore, covered in the parties' pre-filed testimony.

A. The first question was whether "**the Commission even has the authority to override the existing reciprocal compensation arrangements that are in some of the existing interconnection agreements...and if not, would we have the authority to say that any future agreements would have to be based only on bill and keep and could not have other types of reciprocal compensation for MCA services?**" (Tr. p. 490).

Based on Intermedia's research thus far, it first appears that the Telecommunications Act of 1996 does not contain any provision specifically *authorizing* a state commission to reform, revise or otherwise order modifications to an existing interconnection agreement after such an agreement has been approved by a state commission and is in full force and effect. This is so regardless of whether the agreement was the result of voluntary negotiations or of a state commission arbitration proceeding.

Not only is there no positive statutory authority which would authorize such action by state commissions, any attempt by the Commission, in this proceeding, to somehow reform or modify the terms of an interconnection agreement which provides for reciprocal compensation and which already has been approved by the Commission would at minimum seem to run afoul of the overall regulatory framework of Section 252 , Sections 251(b)(5) and 252(d)(2), and the applicable FCC rules governing reciprocal compensation arrangements.

Section 251(b)(5) requires each local exchange carrier to "establish reciprocal compensation arrangements for the transport and termination of telecommunications". Section 252(d)(2) states:

"For the purposes of compliance by an incumbent local exchange carrier with section

252(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."

While Section 252(d)(2)(B) would not necessarily preclude a state commission from approving an interconnection agreement where the carriers have mutually and voluntarily agreed to bill and keep arrangement, nor preclude a state commission from engaging in a rate proceeding regarding appropriate reciprocal compensation rates, the regulatory framework of Section 252 contemplates state commission action in these matters *prior to* the approval of the interconnection agreement at issue, not after.

The previously approved interconnection agreement provisions at issue here by their own terms specifically govern the compensation arrangements for *all* local traffic and as a matter of federal law are currently binding on the parties and are presumably binding upon the Commission at least until they expire. The parties have constructed their various business plans according to the terms of such agreements and should be entitled to rely on these previously approved agreements.

Whether the Commission could order bill and keep for MCA-specific local traffic on a going forward basis for purposes of the Commission's review of all *future* interconnection

agreements (or perhaps in some other generic cost proceeding) is, at least at this point, less clear. The above-cited sections of the Telecommunications Act and the FCC's reciprocal compensation rules would still apply but so would the "most favored nations" provision of Section 252(i). This could create a problem if a new CLEC desired to simply adopt the terms of an existing, Commission approved interconnection agreement which provided for reciprocal compensation rather than bill and keep. In any event, any state requirement the Commission might seek to impose pursuant to Section 253(b) would have to be "competitively neutral".

In addition to these federal requirements, any final order the Commission might issue would have to be based on competent and substantial evidence on the record as a whole as a matter of Missouri state law. *Deaconess Manor Association v. Public Service Commission*, 994 S.W. 2d 602 (Mo. App. 1999); *Friendship Village v. Public Service Commission*, 907 S.W.2d 339, 348 (Mo. App. 1995). Since evidence of the actual amount of traffic exchanged between participating MCA plan carriers was not presented and perhaps may not even be currently available, the record in this case simply may be insufficient to make such a far-reaching determination. Intermedia nevertheless is still researching this issue and intends to supplement its response, as appropriate, in its Reply Brief after it has reviewed the conclusions reached by the other parties.

B. The second question posed by Vice Chair Drainer was **whether the Commission has the legal authority to direct the CLECs "to work out agreements with the small LECs", and if such agreements between the CLEC and the independent small LECs are not executed, does the Commission have the authority to order SWBT to block the CLEC's traffic until such time as proof of the existence of such agreements are provided.** (Tr. pp.

1145-1146).

For purposes of clarification, Vice Chair Drainer presumably is not referring to *direct interconnection agreements* under the federal Telecommunications Act between CLECs and independent LECs but rather to some form of third party traffic termination or exchange agreement for carriers who operate in adjacent service areas. (Tr. 141). The *interconnection* agreement provisions of the Telecommunications Act apply only to *competing carriers*, i.e. where the CLEC is seeking to directly compete head to head with the incumbent LEC in the incumbent LEC's particular exchange or exchanges. As such, it is only when a CLEC is seeking to directly compete with the independent small company LEC within that LEC's exchanges that the direct interconnection provisions of Sections 251 and 252 would come into play, and then, the Federal Act clearly contemplates that such interconnection agreements are to be *voluntary*, at least in the first instance. Only when a carrier refuses to provide interconnection to a potential competitor would the Commission have the authority under Section 252 arbitration procedures to "mandate" the terms of such an agreement and force direct interconnection.

The Commission's official records should show that no Missouri CLEC has sought or received a certificate of service authority to provide service as a competitor in the exchanges served by independent small company LECs. For example, if today Intermedia decided it wished to compete and provide service to new customers in Orchard Farm's territory, it necessarily first would have to come before this Commission to seek a certificate of service authority, approval of an interconnection agreement with Orchard Farm, and approval of an appropriate tariff.

Given this, Intermedia assumes that Vice Chair Drainer's question actually involves what are known as "third party traffic termination or exchange agreements" between the CLEC and the

independent small company LECs and the powers the Commission might have to force the parties to enter into these types of agreements. The question seems to further imply, although apparently there is no (or at best scant) record evidence to support it, that at the present time independent small company LECs are being forced to terminate significant amounts of CLEC traffic without compensation and that the CLECs are somehow at fault for not having traffic exchange agreements in place with the independent small company LECs. It is important, therefore, that Intermedia here clarify the record, at least as far as Intermedia is concerned.

First, there is no evidence in the record that any independent small company LEC is terminating calls from Intermedia without compensation nor that Intermedia has at any time refused to pay applicable tariffed access charges for terminating non-local traffic. As a practical matter, in the case of Intermedia the only possible independent small company LEC that could even be affected is Orchard Farm, and then on an indirect basis, since Intermedia currently operates only St. Louis metropolitan area and does not directly terminate traffic to Orchard Farm (Tr. p. 564, lines 2-6) but rather to SWBT. If anything, given the small size of the Orchard Farm exchange and the location of Intermedia's current customers, it seems far more likely that Intermedia would be terminating more calls from Orchard Farm than vice versa. Be that as it may, all this is pure speculation at this point, the record is silent on the matter, and neither assumption should properly form the basis of the Commission's ultimate decision in this case.

Moreover, the Commission should not presume that the current lack of such agreements is the sole responsibility of the CLECs nor does the evidence presented in this case lead to such a conclusion. It also is not, at least in Intermedia's case, a lack of initiative or incentive on the

CLEC's part in initiating such negotiations with the independent LECs.[1] If anything, the lack of such agreements may be due to new uncertainties on the part of the independent LECs caused by elimination of the Primary Toll Carrier ("PTC") Plan.

Intermedia witness Mellon offered uncontroverted evidence that discussions had already taken place with the independent small company LECs with whom Intermedia might conceivably terminate its traffic although during the hearing she could not recall exactly when such discussions took place. (Tr. p. 571). Shortly after the hearing concluded, counsel was able to locate copies of correspondence evidencing that these discussions indeed did take place. So the record is clear, as early as July 3, 1997 Intermedia sent out a generic written request for traffic exchange arrangements with these independent LECs to which counsel for these LECs specifically replied in writing. (See Attachment 1, letter dated August 5, 1997 from W.R. England, III to Intermedia). As can be seen from this correspondence, Intermedia--on its own volition--was engaged in third party traffic exchange discussions with the independent LECs long before the independent LECs raised the issue in this proceeding.[2]

While no final agreements have yet been forthcoming, the Commission for purposes of this case should remember that such negotiations are a two-way street and that much of the ongoing billing and technical issues between SWBT and the independent LECs are outside the

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[1] Sprint too apparently has, of its own volition, sought discussions with independent LECs. (Tr. 359).

[2] Counsel would have attempted to file a copy of this letter as a late-filed exhibit earlier but only was able to locate it just prior to this brief being due. It is attached only for the sole purpose of responding to Vice Chair Drainer's questions which implied a lack of cooperation on the part of CLECs in pursuing third party traffic agreements with independent LECs, not for the substance of what it says. Obviously, much has changed since the correspondence between Intermedia and the independent LECs occurred and the independent LECs today may legitimately well have a different position.

control of the CLECs.[3] If the need for a traffic exchange agreement was such a burning issue, the independent LECs could have easily followed up with Intermedia long before now. Intermedia recognizes that intervening events, such as for example the PTC case and ongoing controversies between SWBT and the independent LECs, may have delayed the independent LECs' willingness to move forward with its third party traffic exchange agreements with the CLECs. In any event, Intermedia at least has been and remains ready and willing to execute traffic exchange agreements with any of the independent LECs that might eventually terminate Intermedia traffic and has taken affirmative steps in the past to do so without the need for a Commission mandate.

In this regard, there is no inherent regulatory or legal barrier preventing a CLEC or an independent small company LEC from negotiating and reaching some form of third party traffic exchange agreement, or for that matter even a direct interconnection agreement, among themselves. (Tr. 325, lines 14-21). In fact, past Commission precedent should indicate that such agreements involving the incumbent LECs have not been routinely filed or otherwise brought before the Commission for review and approval.

Intermedia appreciates the many concerns voiced by the independent small company LECs in this and other proceedings and in no way is asking the Commission to ignore their legitimate concerns, especially as they might affect CLEC provisioning of MCA service. On the other hand, existing Intermedia MCA and non-MCA customers would be adversely and immediately affected should the Commission condition Intermedia's ability to provide service on

[3] Independent LEC witness Stowell admitted that his company had not approached any of the CLECs about resolving access issue. (Tr. 362).

Intermedia concluding traffic exchange agreements with Orchard Farm or the other independent LECs. Rather than further delay CLEC participation in the MCA plan (or CLEC market entry generally) by conditioning the CLEC's ability to provide service on mandatory CLEC/independent LEC traffic exchange arrangements--which may or may not be readily forthcoming due to issues outside the control of the CLECs--the Commission in its final order in this case should simply strongly encourage all parties to negotiate appropriate voluntary third party traffic exchange arrangements where needed. With regard to MCA traffic specifically, the Commission also should affirm *de facto* bill and keep as the appropriate compensation for MCA traffic between CLECs and independent small company LECs until such time as a different method of compensation might agreed to by the parties. Staff echoes this approach and one independent LEC witness appears to agree that such an arrangement would be appropriate. (Tr. Voight p.141; Stowell pp. 379, 400). The existing MCA plan ILEC participants, including the independent small company LECs, are after all using a bill and keep arrangement for MCA traffic at the present time. To truly address the concerns raised by the independent LECs, the Commission should move forward as quickly as possible in its other related cases to attempt to resolve the outstanding billing record exchange and other technical issues raised by the independent LECs, or if necessary, take up such matters in a new, separate proceeding. Should a specific CLEC at any time refuse to negotiate in good faith, the independent LEC presumably would be able to file an appropriate CLEC-specific petition with the Commission.

Finally, the notion that the Commission might feel compelled in this case to order SWBT or other transiting carriers to block CLEC traffic until proof of third party traffic exchange agreements are in place is very troubling, both as a matter of law and policy. The very idea that

the Commission would consider ordering "blocking" of any calls to resolve a problem involving inter-company billing record exchanges and technical problems seems to run afoul of long standing state law, specifically Section 392.200.6 RSMo Supp. 1999 ("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 has been made."); *See also*, Sections 392.130 and 392.140 RSMo 1994. Commission ordered blocking also is contrary to and inconsistent with the purposes behind Chapter 392, as outlined in Sections 392.185 and 392.200.4(2) RSMo Supp. 1999. The blocking of CLEC traffic also appears to run afoul of the interconnection, universal service and pro-competition policies and provisions of the Federal Act, especially Section 253(a) which on its face states that no state regulation or requirement "may prohibit, or have the affect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service". If call blocking by an incumbent LEC is not prohibited by this provision perhaps nothing much is.

Even assuming, however, that the Commission's imposition of a call blocking requirement on a transiting carrier such as SWBT somehow would be lawful, as a practical matter it is not sound policy. Not only would call blocking thwart emerging competition by acting as a very real barrier to entry for new competitors, and quickly destroy any market share an existing CLEC might already have with existing customers, it more importantly would harm the customers who, after blocking was implemented, would no longer be able to complete their calls, MCA or otherwise. As a matter of policy, this Commission's actions at minimum should not harm customers even if the intent is to insure compliance by the carriers of otherwise worthy

regulatory goals or to provide the carriers with an incentive to resolve what heretofore obviously has not been an easy problem to solve. Requiring the blocking of existing CLEC traffic, for whatever reason, would do just that, especially if the CLEC customer is already receiving service. Moreover, the blocking of CLEC traffic in and of itself would seem to complicate, rather than help resolve the difficult, ongoing records and technical issues between SWBT and the independent LECs over compensation for third party traffic.

II. SWBT's MOU

SWBT's MOU (Ex. 1, Voight Direct, Schedule 6-1 et. seq.) was signed by Intermedia on December 3, 1999. Contrary to SWBT's repeated characterization of the MOU as being an arms-length, "voluntary" arrangement agreed to by the parties (Tr. p. 1082, lines 6-7; p. 1083, lines 18-19; p. 1084, lines 22-23), the Commission hopefully will recognize that Intermedia as a practical matter had no choice but to agree to its terms or risk very serious consequences for both itself and its customers. (Ex. 14, Mellon Rebuttal, pp. 7-8; Ex. 1, Voight Direct, pp. 39-40). SWBT's suggestion that Intermedia should have sought out arbitration before the Commission or some other form of alternative dispute resolution to address SWBT's NXX switch re-translation threats ring very hollow in light of the immediacy of the customer crisis facing Intermedia prior to the execution of the MOU and the time this case already has required just to get to this point.

SWBT apparently views CLEC execution of SWBT's MOU as a prerequisite for recognition of the CLEC as an MCA plan participant, regardless of the CLEC's Commission-approved certificate and tariff and without regard to the input of any other MCA plan participant or Commission approval of the terms of the MOU. (Tr. 1014-1015). The simple fact that no other CLEC has yet to "avail itself" of SWBT's MOU, even though to do so would require

SWBT to recognize the CLEC as a full MCA plan participant, should be an indication of the unreasonableness of the MOU itself and the fact that the MOU is an unlawful barrier to entry. The fact that SWBT did not submit its MOU to the Commission for review and prior approval[4], and SWBT's insistence that its MOU is *not* subject to the requirements of Sections 251 and 252 of the Telecommunications Act, should cause the Commission much concern. It should be the Commission, not SWBT, that determines the terms of CLEC participation in the MCA plan and sets regulatory policy. (Ex. 1, Voight Direct, p. 43, lines 10-16; p. 44, lines 3-8; Ex. 23, Cadieux Direct, p. 15-16).

Several of the provisions of SWBT's MOU are clearly contrary to the Commission-approved MCA plan itself and are otherwise patently unreasonable. One fundamental and integral component of the MCA plan is the toll-free return calling feature and the requirement that MCA plan participants provide this service. Under the existing MCA plan, no participating LEC is required to pay any other LEC any additional compensation for the toll-free return calling feature anywhere within the MCA calling scope. (Ex. 46, Report and Order, TO-99-306).

Under the terms of SWBT's MOU, however, SWBT is inappropriately requiring Intermedia to pay a 2.6 per minute charge to SWBT for revenue losses resulting from competition and for the simple ability for SWBT to permit its own MCA customers to call Intermedia MCA customers toll free. (Ex. 1, Voight Direct, pp. 44-46; Ex. 11, Kohly Direct, pp. 20-26; Ex. 12, Kohly Rebuttal, pp. 5-9; Ex. 13, Kohly Surrebuttal, pp. 15-23; Ex. 18, Wissenberg Rebuttal, pp. 2-5, 6-9; Ex. 20, Starkey Direct, pp. 12-13; Ex. 23, Cadieux Direct, pp. 18-22; Ex.

[4] Intermedia witness Mellon testified that Intermedia requested that the MOU be submitted to the Commission for prior approval but that SWBT refused to do so. (Tr. 572).

24, Cadieux Rebuttal, pp. 12-23, 28-33; Ex. 25, Cadieux Surrebuttal, pp. 21-26; Ex. 27, Pomponio Rebuttal, p. 4; Ex. 28, Phillips Rebuttal, pp. 8-10). It is important to note that Sprint also has taken the position in this case that the compensation sought by SWBT in its MOU is inappropriate and that GTE Midwest Incorporated, the Missouri Independent Telephone Group, and the Cass County Group specifically have taken no position. (*See* Statements of Position, filed April 25, 2000).

While the various permutations between customers, tiers, and lost revenues can easily become confusing, it is clear by its own terms that SWBT's MOU requires Intermedia to pay the 2.6 cents per minute charge for **ALL** toll-free return calling--even for those calls from SWBT customers in the Principal Zone and Tiers 1 and 2 to Intermedia customers in Principal Zone and Teirs 1 and 2 **where MCA is a mandatory and NOT an optional service**. (Ex. 1, Voight Direct, Schedule 6-2, Paragraph 2(b), MOU). As discussed in the testimony of the various parties cited above, SWBT's desire to be compensated for lost toll revenues where no such compensation could possibly be due is at least bold, if not at all supportable.

At hearing SWBT witness Huges was asked what a CLEC gets in return for paying SWBT's 2.6 cents per minute charge. He responded:

> "What a CLEC would receive is the return calling portion. You're asking us to allow our customers to call your customers on a toll-free basis when otherwise that call would have been dialed on a 1+ basis and we would have received intraLATA toll or originating access from an IXC." (Tr. p. 965, lines 15-20).

Since none of SWBT's customers in the MCA Principal Zone, Tier 1 and Tier 2 would make 1+ toll calls to call another customer within those same tiers, it is simply impossible for SWBT to

legitimately claim it can have any lost toll revenues for such calls. SWBT's MOU, however, clearly states that Intermedia must compensate SWBT at 2.6 cents per minute for these very calls. While at hearing SWBT seems to have been willing to modify this clearly inappropriate MOU provision *on a going forward basis*, SWBT was still clear that it intends to enforce the terms of its MOU against Intermedia as written unless the Commission issues an order to the contrary. (Tr. 1042-43; 1081-1085).

For all the above reasons the Commission should declare SWBT's MOU null and void, otherwise contrary to the public interest, and not the appropriate framework to govern CLEC provisioning of MCA service in the future. There is also a matter of urgency for the Commission to make this ruling, peculiar to Intermedia. Pursuant to the terms of the MOU, Intermedia is required to pay SWBT the 2.6 cents per minute of use for all calls made on or after July 20, 1999 through the period of either: 1) the termination of Intermedia's interconnection agreement with SWBT; or 2) until the Commission issues "a *final* order" in this case addressing the validity of the 2.6 cents per minute charge. (Ex. 1, Voight Direct, Schedule 6-2 and 6-3, paragraph 3). While the MOU does provide for a retroactive true-up of any compensation owed as a result of the Commission's final order issued in this case, if the Commission fails to issue its final order prior to November 5, 2000, SWBT under the terms of the MOU is relieved of its true-up obligation and will be allowed to retain ALL compensation paid to it by Intermedia.

The one-sided nature and unreasonableness of the terms of SWBT's MOU, unfortunately, does not stop there. SWBT's MOU further purports to define "final order" in this proceeding as including "revisions as a result of any appeal by any party and/or remand of such decision". (Ex. 1, Voight Direct, Schedule 6-3, paragraph 4). When SWBT executed its MOU in December

1999, SWBT certainly knew that the Commission would be hard pressed to complete its review of this extensive case and issue an order before SWBT's November 5, 2000 deadline. Likewise, SWBT certainly is familiar with how long it takes for a Commission case involving complex issues with multiple parties to work its way through the courts on appeal and possible remand. This provision defining "final order", standing alone and on its face, therefore could not be anymore unconscionable, unreasonable, and deserving of a strong remedial response by the Commission.

For these reasons, it is especially important to Intermedia that the Commission not delay its decision (so any applications for rehearing can be filed and ruled well in advance of SWBT's November 5, 2000 MOU deadline) and that when the Commission issues its order such order is at least a *final* Commission order in this proceeding. To the extent that the Commission determines that further review of MCA-related matters are required, Intermedia asks that same be undertaken in a new and separate case.

III. CONCLUSION

The Commission should reaffirm that CLECs are authorized to participate as full participants in the MCA plan. The Commission should adopt AT&T's six recommendations regarding CLEC provisioning of MCA service and postpone consideration of Staff's proposed MCA-2 plan to some future proceeding. The Commission should reject SWBT's MOU as being unreasonable, not in the public interest, and not the appropriate framework for the provision of MCA service by CLECs in the future. The Commission furthermore should declare the MOU to be null and void in its entirety. The Commission should issue its *final* decision in this case as soon as practical. To the extent the Commission determines that it needs to consider further

If, after your review of this letter you have any questions or would like to discuss it more thoroughly, please feel free to give me a call.

Sincerely,

W.R. England, III

WRE/da

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August 5, 1997

VIA FACSIMILE & MAIL

Mr. Craig Neeld, Manager
Strategic Planning - Regulatory Policy
Intermedia Communications
3625 Queen Palm Drive
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Re: Request for Traffic Exchange Arrangement

Dear Mr. Neeld:

I represent a number of "small" incumbent local exchange carriers (ILECs) serving in the State of Missouri. Some of these small LECs have asked me to respond to your July 3, 1997 letter in which you refer to your Interconnection Agreement with Southwestern Bell Telephone Company and a requirement contained therein that you have an arrangement in place with all ILECs in the 520 LATA for the exchange of "Third Party Traffic." I understand that many, if not all, of the Interconnection Agreements between SWBT and competitive LECs (CLECs) require the CLEC to be responsible for intrastate intralata toll traffic which originates from their subscribers in accordance with the Missouri Primary Toll Carrier (PTC) Plan. In that regard, Intermedia would be responsible for paying terminating access to SWBT for intrastate intralata traffic originating from its subscribers and terminating any where in the LATA. To the extent that intralata toll traffic terminated in the exchanges of ILECs other than SWBT, SWBT would be responsible for paying appropriate terminating access rates to those Third party ILECs. Thus, it would not be necessary for Intermedia to have a Mutual Traffic Exchange Compensation Arrangement with these other ILECs for the termination of intrastate intralata toll traffic.

There is one exception to this arrangement. One of the companies I represent (Fidelity Telephone Company) is a Primary Toll Carrier under the PTC Plan and in the case where customers of Intermedia place intrastate intralata calls to customers of Fidelity Telephone Company (and vice versa) a "PTC Agreement" between Intermedia and Fidelity will, in all likelihood, be required in order to facilitate the payment of intrastate access charges. Fidelity Telephone Company is willing to enter into a PTC Agreement with Intermedia as long as it is substantially the same as the PTC agreements Fidelity has with other Primary Toll Carriers such as SWBT and GTE.

If, after your review of this letter you have any questions or would like to discuss it more thoroughly, please feel free to give me a call.

Sincerely,

W.R. England, III

WRE/da