BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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 TO-99-483

GABRIEL COMMUNICATIONS OF MISSOURI, INC.'S REPLY BRIEF

Gabriel's Briefs demonstrate that the Commission now needs to act immediately to preserve the status quo, reaffirm CLEC participation in the MCA Plan, and prohibit any further ILEC interference with CLEC participation. ILEC interference with authorized CLEC participation in the MCA should not be allowed to continue any longer.

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

As indicated in Gabriel's Initial Brief, and confirmed by the other parties' briefs, no party opposes CLEC participation in the Commission's MCA Plan going forward. Hence, the Commission should reaffirm CLEC participation in the Plan. Further, the Commission should prohibit all further ILEC interference with CLEC participation.

The ILECs continue to dispute current participation by CLECs in the MCA Plan, but only because they cannot bring themselves to openly admit that their interference with CLEC participation has been unjustified, improper, and illegal. Of course, despite the fact that they do not oppose CLEC participation, the ILECs have opposed interim relief in this case and have insisted that the Commission allow such participation only after a full hearing in this case – notwithstanding the undeniable substantial negative impact on local competition and consumers of the resulting delay in termination of ILEC interference. The ILECs then try to use their unilateral interference and insistence upon yet another Commission order as proof that the CLECs are not currently participants! (Cass Brief, p. 7, MITG p. 13). Not exactly the type of

industry cooperation the Commission should be able to expect regarding such a critical component of local service as the MCA Plan.

The ILECs ignore the facts when they argue that CLECs are currently not participants in the MCA.

First, the Commission has fully certificated CLECs to provide MCA service. (Cadieux Rebuttal, p. 7-8, Dale Rebuttal, p. 3, Surrebuttal p. 3). No party has been able to identify any additional certificate that would be required beyond the existing certificates providing for local and interexchange service authority. (Hughes, Tr. 1004-05, 1040-41). Certificates do not identify services by name, including MCA or SWBT's Local Plus. No one has suggested that the ILECs needed additional certificate authority when MCA service was introduced. To prevent any further delay tactics by the ILECs, the Commission should make it clear that CLECs do not require additional certificates of service authority by reaffirming CLEC participation in the MCA Plan.

Second, contrary to ILEC assertions, the Commission has expressly authorized CLEC participation in the MCA. The ILECs consistently ignore the fact that CLECs have been authorized resellers of MCA service since the beginning of local competition, as a result of the Commission's Dial U.S. decision. See 5 Mo.PSC 3d 133. SWBT expressly admitted in the AT&T arbitration that CLECs were participants in the MCA. (Cadieux Rebuttal, p. 25-27, Kohly Direct p. 9-10). The ILECs even admit in this case that CLECs are participating when resale or ported numbers are involved. (SWBT Brief, p. 28, 43). Now, to defend their anti-competitive actions, the ILECs contend the Commission has made no such determination, because MCA was not expressly mentioned in CLEC certification cases. (SWBT Brief, p. 31). As shown above, that is bunk.

Third, the Commission has approved CLEC tariffs for MCA service. (Cadieux Rebuttal, p. 7-8; Dale Rebuttal, p. 3-4; Surrebuttal p. 3). SWBT asserts some of these tariffs do not mention MCA by name, but does not dispute that some CLECs – like Gabriel – offer the service. (SWBT Brief, p. 31-32). Of course, the ILECs contradict themselves by asserting in this case that the CLECs should not use the MCA name unless their total service package matches the ILECs' MCA service exactly. Further, contrary to SWBT's implications (SWBT Brief, p. 32, n. 6), it is irrelevant that the CLEC tariffs do not identify the reciprocal service obligations of the other companies participating in the MCA Plan, as the ILECs tariffs do not do so either. See, e.g., Exhibit 59. Just as was the case when the Plan commenced, all participating companies are dependent upon each other to tariff the service. (Hughes, Tr. 1002-04). The CLECs have filed their MCA tariffs, and the Commission has approved them.

Fourth, the ILECs have treated the CLECs as participants at least when resale or ported numbers are involved, and perhaps in other circumstances at least early on. The ILECs have not offered any explanation for their fluctuating interpretations of their tariffs. Sometimes calls to CLEC MCA subscribers are toll-free MCA calls, and sometimes they are not, according to the ILECs' conduct. Yet, their tariffs do not support any distinction in service that depends on the identity of the called party's provider, or whether that provider is using resale or number portability. The ILECs have violated their own tariffs by selectively imposing toll charges on their customers for some, but not all, MCA calls to CLEC subscribers.

Given that no party opposes CLEC participation in the MCA Plan going forward, why then does it matter whether CLECs are currently participants who are experiencing ILEC interference, or rather are non-participants? It matters because the ILECs seek to portray the CLECs as attempting to change the MCA Plan in this case, when in truth it is the ILECs that want to change the Plan.

The MCA Plan is a multi-carrier local calling plan. As shown above, the Commission has already authorized CLECs to participate, and needs to reaffirm that decision and put an end to ILEC interference with CLEC participation. The Commission has already allowed competitive pricing of MCA by CLECs, and has from the beginning of the Plan recognized that ILECs could propose price changes as well (see infra issue d.). The Commission has already allowed CLECs to combine MCA service with additional outbound calling scopes, just as it has done with ILECs such as SWBT and its Local Plus service. (See infra issue b.). The Commission has already decided that reciprocal compensation applies to MCA traffic exchanged between interconnected CLECs and ILECs operating in the same areas, and from the beginning of the Plan decided that carriers operating in adjoining areas should exchange such traffic on a bill-and-keep basis. (See infra issue f.).

The CLECs are not seeking a change in the Commission's prior decisions regarding their participation in the MCA Plan. They simply want the Commission to put an end to ILEC interference with that participation. The CLECs do not seek an advantage; they simply want the ILECs to comply with the law. The CLECs do not seek to change ILEC calling scopes; they simply want the ILECs to fulfill their mutual obligations under the Commission's MCA Plan.

It is the ILECs that seek change. After attempting to extort change from CLECs (unsuccessfully except for Intermedia) by obstructing CLEC participation in the MCA, now the ILECs ask the Commission to impose change. Specifically, SWBT wants to change inter-company compensation by eliminating reciprocal compensation between competing LECs and by imposing SWBT's MOU – the dialing parity/competitive loss surcharge. SWBT asserts that inter-company compensation is the only real issue in this case. (SWBT Brief, p. 2). The rural ILECs should then have no quarrel at all with the CLECs, given that they face no competition and agree on inter-company compensation with the CLECs. Nonetheless, they inexplicably seek

to restrict CLEC activity in SWBT services areas by seeking to alter inter-company compensation between SWBT and CLECs and by seeking to impose limits on competition in SWBT service areas.

The ILECs cannot escape the facts. They admit that they initially treated CLECs as full MCA participants, but then changed their position. (Stowell, Tr. 368). They admit that they continue to treat CLECS as participants when resale or ported numbers are involved. (Unruh, Rebuttal p. 6, Hughes Tr. 1009-11). They admit that they will treat CLECs as "full" participants without a Commission order if CLECs sign SWBT's MOU. They admit that they have unilaterally and repeatedly changed their practices and their interpretation of their MCA tariffs without any Commission authorization. (Hughes Tr. 1002-16). The bottom line is the ILECs have interfered with the participation of the CLECs in the Commission's MCA Plan, to the detriment of all Missourians, without any justification or authority, solely to impede competition and achieve their goal of altering inter-company compensation.

The Commission needs to reaffirm its prior actions and declare that CLECs are full participants in the MCA Plan, that all participating companies have full pricing flexibility under applicable statutes regarding MCA service, that all participating companies have the ability to propose additional outbound toll-free calling plans for their customers, and that previously-established inter-company compensation mechanisms remain applicable. In short, the Commission needs to: (i) preserve the status quo regarding the competitive provision of MCA service pursuant to existing certificates, tariffs, interconnection agreements, and bill-and-keep arrangements; and (ii) prohibit further ILEC interference with CLEC participation in the MCA Plan. (Cadieux Rebuttal, p. 43-44, Dale Rebuttal, p. 10).

The key steps, once again, are as follows:

(1) Prohibit SWBT's MCA screening and blocking practices, prohibit any other type of blocking including interference with resale or use

of number portability, and direct all MCA participants - CLECs and ILECs – to recognize the other participants' designations of NXX codes as MCA codes.

(2) Prohibit SWBT's discriminatory surcharges on CLECs for MCA calls from SWBT customers.

(3) Allow CLECs and ILECs continued pricing flexibility for MCA service pursuant to the applicable statutes.

(4) Allow CLECs and ILECs continued flexibility to combine additional outbound toll-free calling with MCA service.

(5) Allow CLECs and ILECs operating in adjoining service areas to continue to exchange MCA traffic on a bill-and-keep basis, and allow CLECs and ILECs that directly interconnect to continue to exchange MCA traffic pursuant to the reciprocal compensation provisions of their approved interconnection agreements.

(Cadieux Direct, p. 33; Tr. 827-30; Kohly Direct, p. 27).

Because it is now undisputed that CLECs should be allowed to participate in the MCA, only a few more observations regarding the unlawfulness of ILEC interference, such as SWBT's screening and blocking practices, need to be presented.

In its Brief, SWBT attempts to defend its practices against charges of violation of local dialing parity requirements. (SWBT Brief, p. 19-22). Its defense rests solely on its contention that CLECs and their customers are not currently MCA participants. SWBT admits that the availability of local dialing cannot be made dependent upon the identity of the called party's provider. Hence, because SWBT and the other parties all concede CLECs should be able to participate in the MCA, they also concede the local dialing disparity must end.

Further, SWBT's defense of its current imposition of dialing disparity must fail, because any incumbent calling plan that purports to allow a customer toll-free local calling to other customers of the incumbent but not to the customers of other providers by definition violates the

plain language of the FCC's rules. SWBT witness Hughes admitted as much. (Tr. 1029-30). 47 CFR 51.207 expressly prohibits such a calling plan, stating:

> 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 notwithstanding the identity of the customer's or the called party's telecommunications service provider. (Emphasis added).

SWBT and the other ILECs simply cannot circumvent the local dialing parity requirements of Federal law through their efforts to interfere with CLEC participation in the MCA Plan.[1]

At page 19, SWBT incorrectly states that Gabriel contends that dialing parity rules require SWBT to provide toll-free calling to all CLEC customers in the MCA area. What Gabriel has contended and proved is that local dialing parity rules preclude use of the identity of the called party's local service provider as the criteria for the availability of toll-free calling. This means that either CLECs must be allowed to participate fully in the MCA or the MCA Plan must be terminated. Because CLEC participation is no longer opposed, termination is not necessary.

At page 21 of its Brief, SWBT asserts CLEC customers choose not to be MCA subscribers and, therefore, the CLEC cannot complain about dialing parity. SWBT does not explain how CLEC customers have a choice if CLECs are not MCA participants as SWBT contends. SWBT also asserts that Gabriel violates the dialing parity rules by offering both MCA and non-MCA service. (SWBT Brief, p. 19, n. 5). SWBT ignores the fundamental difference between its "interpretation" of MCA calling as only including ILEC MCA subscribers, versus Gabriel's provision of MCA and non-MCA calling at the choice of the customer regardless of the identity of the called party's serving LEC. Also, SWBT fails to explain how Gabriel could have MCA subscribers if it is not an MCA participant as SWBT contends.

[1] SWBT's discussion of toll dialing parity requirements is not on point. MCA is a locally dialed service.

Hence, the Commission should prohibit any and all interference with CLEC participation in the MCA Plan, including SWBT's MCA screening and blocking practices. The Commission cannot accomplish the goals of its MCA Plan or comply with federal and state law without allowing the full competitive participation of CLECs in the Plan.[2]

b. If permitted to participate in the MCA Plan, should CLECs be required to follow the parameters of the MCA Plan with regard to (a) geographic calling scope, (b) bill and keep inter-company compensation, (c) use of segregated NXXs for MCA service, and (d) price?

In order to resolve this issue, the Commission must first correctly identify "the parameters of the MCA Plan". Those parameters, as established by Commission orders, approved tariffs, and approved interconnection agreements, are:

(1) A specific multi-carrier, reciprocal local calling scope that may be offered in conjunction with other single-carrier calling plans;

(2) Bill-and-keep inter-company compensation between carriers serving adjoining areas and reciprocal compensation between carriers serving the same areas;

(3) Use of segregated NXXs to identify MCA subscribers; and

(4) Pricing flexibility subject to Commission review under applicable statutes as determined by the identity and legal status of each carrier.

These parameters cannot be legitimately disputed. Gabriel simply seeks to stay within these parameters and continue the status quo, without any further interference by SWBT and the other ILECs. Gabriel seeks no advantage; rather it seeks elimination of the severe

[2] While CLECs should be allowed the competitive option of not offering MCA service, it probably is not a practical competitive option. Gabriel suggests that any mandate of CLEC participation would likely constitute a barrier to competitive entry prohibited by Section 253 of the Telecommunications Act. This discussion only concerns optional MCA, because mandatory MCA is basic local service that must be offered by statute.

disadvantage imposed upon it by the unilateral unauthorized interference of SWBT and the other ILECs.

As SWBT admits in its Brief (p. 20), the only parameter that is really in dispute is inter-company compensation (item (2) above). But when SWBT and the rural ILECs argue that CLECs must follow the parameters of the Plan, what they mean is that the Commission should overturn its prior decisions regarding reciprocal compensation and alter the approved interconnection agreements that have implemented these decisions. Again, it is SWBT and the rural ILECs that seek to change the MCA Plan.

Gabriel will follow the organization of its Initial Brief and address inter-company compensation, NXX segregation, and pricing under the applicable separate issue headings.

Regarding geographic calling scopes, Gabriel still believes that there really is no contested issue. Gabriel agrees that MCA is a multi-carrier plan that requires reciprocal calling scopes between participating carriers.[3] SWBT concedes that Gabriel and other CLECs can and should be able to offer other calling plans in conjunction with MCA service, just as SWBT does with Local Plus service. (SWBT Brief, p. 34-35, 64 n. 12). All parties appear to agree, provided that any such other calling plans is named something besides MCA.[4] Gabriel does not seek to require SWBT or other ILECs to offer additional toll-free calling beyond what is required under the MCA Plan. Gabriel does not seek to avoid payment of access charges on non-MCA interexchange traffic.

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[3] While Gabriel suggested in testimony that the Commission might consider allowing CLECs to offer MCA with a smaller calling scope, Gabriel has not tariffed such an offering and Gabriel has conceded that such an offering probably cannot work given the multi-carrier, reciprocal calling scope nature of the MCA Plan.

[4] However, no MCA participant should be permitted to mislead the public by making assertions that companies that do not use the name "MCA" are not participating in the MCA Plan. If a company offers MCA calling (regardless of the service name it uses), no other company should suggest otherwise.

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

Gabriel continues to believe that no party has demonstrated any need for new restrictions on customer use of MCA service. It is interesting that SWBT not only acknowledges, but also expressly "supports" the Commission's prior decision allowing CLECs to participate in the MCA Plan as resellers (SWBT Brief, p. 43). Yet, SWBT continues to assert that CLECs are not currently participating in the MCA. SWBT also acknowledges, as it must under Federal law, that ISPs are and should remain MCA subscribers without restriction, and that other MCA customers can and should be able to place local calls that terminate to ISPs without restriction. (SWBT Brief, p. 43). Gabriel submits that the issue of applicability of reciprocal compensation to such local traffic has not been presented in the issues listed in this case, has not been adequately presented on the record, and should be addressed in other proceedings now pending before the Commission (case No. TC-2000-225).

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

As demonstrated in Gabriel's Initial Brief, competitive pricing of MCA service by CLECs is essential to successful market entry. (Voight, Tr. 211-12). Any attempt to mandate uniform pricing of such a core service, affecting the vast majority of local traffic in the metropolitan areas of the state (the only areas where competition is emerging, at least in part because of the constraints of Section 392.451 R.S.Mo.), would constitute an unlawful barrier to entry and further would deprive consumers of the most important benefit of competition. (Voight, Tr. 211-12, Cadieux Rebuttal, p. 35-36). Federal and state statutes preclude any such uniform price mandate. See Section 253 of the Telecommunications Act of 1996; Sections

392.185 and 392.200.4(2) R.S.Mo. Further, there is no policy reason for such a price mandate. Public Counsel has now recognized the need for and benefits of pricing flexibility and has abandoned all arguments for uniform MCA rates. There is no evidence to support ILEC claims that competitive pricing would threaten the MCA Plan. (Cadieux Surrebuttal, p. 9-10; Dale Rebuttal, p. 5-6).

The Commission has classified CLECs as competitive companies providing competitive services, including MCA service. (Cadieux Direct, p. 38; Surrebuttal, p. 10). The Commission recently reaffirmed the competitive status of CLECs in Case No. TO-99-596. Missouri law provides that CLECs, as competitive companies, have pricing flexibility over their services under Sections 392.361 and 392.500 R.S.Mo. CLECs have been utilizing their flexibility in their pricing of MCA service with Commission approval. (Cadieux Rebuttal, p. 7; Dale Rebuttal, p. 4-5). No party has demonstrated any basis for mandating a price increase for CLEC MCA customers. No party has refuted the fact that incumbent pricing will effectively cap CLEC pricing. (Voight Tr. 189-90; Kohly Tr. 489, Hughes Tr. 1022-23).

The ILECs assert they should have the same pricing flexibility as CLECs. (SWBT Brief, p. 41). SWBT's fervent desire for more flexibility seems incongruous with its complete failure to exercise the flexibility it already has, and has had since MCA service was introduced. See 2 Mo. PSC 3d 1, 20. (Cadieux Direct, p. 37; Hughes Tr. 1021). The rural ILECs are more direct – they oppose price flexibility and state they do not need it due to lack of competition. (MITG Brief p. 2). Gabriel submits that the Commission need not consider such arguments of disinterested carriers regarding price flexibility outside their territories.

The law does not allow identical price regulation of different types of companies. There are reasons one group is called ILECs and the other group is called CLECs; namely that ILECs are monopolies subject to emerging competition, and CLECs are new market entrants struggling

to chip away at the monopoly. This extreme difference in market power has led to a wide variety of differences in the ways such companies are regulated, including price regulations. Thus, CLECs have pricing flexibility under Section 392.500 R.S.Mo. and ILECs have pricing flexibility under either the price cap or rate-of-return statutes, Sections 392.245 and 392.220-392.240 R.S.Mo. respectively.

SWBT and MITG erroneously assert the Commission could somehow in this case give SWBT additional pricing flexibility pursuant to Section 392.361, notwithstanding SWBT's status as a price cap company under Section 392.245. A price cap company is subject to Section 392.245 and any purported classification under Section 392.361 would not alter the applicability of the price cap pricing controls. Those controls establish maximum prices and allow price changes subject to such maximum prices pursuant to Section 392.200. See Section 392.245.4(5) and 392.245.11. The statute also provides for a service-by-service competitive classification process, with resulting additional pricing flexiblity, that is completely separate from Section 392.361. See Section 392.245.5. In any event, Section 392.361 establishes specific procedures that have not been followed in this case, so ILECs would have to present such arguments in another proceeding.

SWBT's arguments that CLECs could engage in predatory pricing are without merit. (SWBT Brief, p. 42). First, SWBT and the other ILECs can match any CLEC rate reduction. They already have the flexiblity to do that. Second, the record establishes, and common sense confirms, that CLECs cannot possibly engage in predatory pricing. (Cadieux Direct, p. 37-38, Voight Tr. 189; Kohly Tr. 516-18; Hughes Tr. 1019-20).

Competitive pricing flexibility is a market and legal reality. ILECs continue to have the ability to change their prices to meet emerging competition, under applicable statutes. Consumers benefit from price competition. They are supposed to "look over the fence" and see

if better deals are available. Consumers will not benefit from the imposition of uniform monopoly prices by the State.

e. How should MCA codes be administered?

There does not appear to be much of a dispute on this issue. All carriers agree that differentiation between MCA and non-MCA NXX codes must continue under the current MCA Plan. While Staff remains concerned about NXX exhaustion, it seems to agree that elimination of NXX code segregation will have to continue unless and until the MCA Plan is changed in a subsequent proceeding. (Staff Brief, p. 5-6, 12). No process of "opening up all codes" can work under the current MCA Plan. (Voight, Tr. 91-102, Cadieux Direct, p. 34, Rebuttal, p. 18, 45). On the other hand, if a carrier like Gabriel chooses to serve non-MCA customers strictly by means of resale, it will not need and should not be required to designate a separate non-MCA NXX code that would go unused.

Gabriel continues to support the verified notification process described in its Initial Brief. The ILECs disagree over the utility of the LERG, but all acknowledge a notification process would work. (Hughes, Tr. 1017-18, Evans Tr. 1179; Matzdorff Tr. 1203). SWBT has not adequately explained how the LERG would work, or how the industry could be assured SWBT would not abuse the LERG in the future, as it has done in the past to try to exclude CLECs from the MCA. (Unruh Direct, p. 13). All parties acknowledge the Commission can serve as the centralized source regarding MCA NXX designations.

It is essential that the Commission prohibit any MCA participant from acting as a gatekeeper. All participants must accept the notices of other carriers and bring any disputes to the Commission.

Given the past conduct of the ILECs, the Commission should also make it clear that CLECs can continue to designate resale and ported NXX codes as MCA codes.

f. What is the appropriate inter-company compensation between LECS providing MCA services?

The status quo of non-discriminatory inter-company compensation is: (1) reciprocal compensation between interconnected CLECs and ILECs operating in the same exchanges; and (2) bill-and-keep between CLECs operating in adjoining exchanges. (Cadieux Rebuttal, p. 38-39, 42-43, Surrebuttal p. 18; see also Hughes Tr. 1007).

The Commission's Orders regarding CLEC authority to participate in the MCA, as set forth under issue a., obviate the need for any further authority for CLECs to exchange MCA traffic with rural ILECs on a bill-and-keep basis. There is no evidence that CLECs have terminated non-MCA traffic to the rural ILECs. Hence, MITG's assertion that CLECs have violated their interconnection agreements (MITG brief, p. 13) is totally unfounded. Moreover, all parties agree that the ILECs have been sending MCA traffic to the CLECs on a bill-and-keep basis (i.e. Stowell Tr. 367). Neither CLECs nor the rural ILECs want to pay access charges on MCA traffic, and the Commission has recently confirmed that access charges do not apply to such local traffic. See Case No. TT-00-428. Given the parties' past conduct and future desires, there is no room to dispute that bill-and-keep is in place and should continue as between carriers operating in adjoining areas.

Likewise, given the Commission's express decision to adopt reciprocal compensation for MCA traffic in the AT&T arbitration, which has subsequently been incorporated into numerous Commission – approved interconnection agreements, there is no room for legitimate debate on the point that reciprocal compensation is the established means of inter-company compensation

between carriers serving the same area. (Cadieux Direct, p. 42-43, citing Arbitration Order, Case No. TO-97-40, issued December 11, 1996, Rebuttal, p. 23-24, 26, 39-41; Hughes Tr. 1006-07) (See also Arbitration Order Regarding Motions for Clarification, p. 9 and Attachment B pages 18-22 (October 2, 1997)). SWBT's assertion that the Commission did not address MCA traffic in the AT&T arbitration is untenable. SWBT's witness expressly reassured the Commission that CLECs would be able to provide MCA (as quoted in Mr. Kohly's Direct testimony at page 9-10), and SWBT expressly argued for reciprocal compensation because of the adverse impacts of bill-and-keep on it that it said would result from the provision of MCA service by CLECs. As Mr. Cadieux testified:

> As summarized by the Commission, SWBT contended that "if AT&T and MCI do not pay access charges, SWBT will suffer financial losses and 'be unable to effectively compete through its MCA offerings.' The current bill and keep arrangement would allow AT&T and MCI to offer MCA service to its customers without charging them the MCA additive." Arbitration Order, p. 40, Case No. TO-97-40 (December 11, 1996).
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> It is noteworthy that SWBT did not contend in the arbitration, as it does now, that CLECs could not participate in the MCA absent Commission action. Rather, as shown by the Commission's summary of SWBT's position set forth above, SWBT acknowledged that CLECs would be participating in the MCA and expressed concerns about its ability to compete with them. Specifically, in its Initial Brief to the Commission (citing the testimony of witness Bill Bailey), SWBT contended that "the MCA additive which is charged by SWBT is set sufficiently high that the carriers will be able to pay access charges while profitably providing 6+ to 40+ hours of MCA calls to customers while matching SWBT's MCA rates." SWBT also described AT&T and MCI as being "able to offer full termination from and to MCA areas." (SWBT Initial Brief, pages 73-74, Case No. TO-97-40).

(Cadieux Rebuttal p. 25 and 27). Thus, the underlying premise of the ILECs argument for bill-and-keep, that the MCA Plan only involves bill-and-keep arrangements, is false. (SWBT Brief, p. 38). The vast majority of MCA traffic exchanged between the CLECs and ILECs involves SWBT and is subject to reciprocal compensation under SWBT's interconnection agreements.

CLECs are not seeking any advantage. They are seeking preservation of their interconnection agreements. SWBT opposed bill-and-keep between competing carriers and the Commission imposed reciprocal compensation. (Cadieux Rebuttal, p. 24-27, 41-42; Hughes Tr. 1007-08; Kohly Tr. 508). CLECs have planned their businesses in accordance with that decision. (Dale Rebuttal, p. 4-5). They have a right to rely upon their approved contracts.

As established in Gabriel's Initial Brief, the Commission does not have authority to alter these contracts in the manner proposed by the ILECs. (Gabriel, Initial Brief, p. 25-28). The ILECs suggest that the Commission could simply condition CLEC participation in the MCA upon CLEC acceptance of bill-and-keep in lieu of existing reciprocal compensation contracts. They cite no authority for the contention that the Commission can condition CLEC participation on forfeiture of legal contract rights and subversion of federal interconnection procedures. There is nothing competitively neutral about such a requirement, nor would any provision of the Telecommunications Act otherwise justify such coercive measures. CLEC participation is mandatory to continuation of the Plan and cannot be unlawfully made conditional in the manner suggested by the ILECs.

Interconnection agreements must be made pursuant to Section 252 of the Act, and cannot be altered in violation of those procedures. Further, Section 251 and associated FCC rules (47 CFR 51.701 et seq.) regarding reciprocal compensation do not authorize imposition of bill-and-keep arrangements on only a portion of local traffic or without regard to traffic flows and costs. General state law provisions, such as those cited by the rural ILECs, must yield to the mandates of the Telecommunications Act.

SWBT falsely suggests that bill-and-keep is more fair or "equal" then reciprocal compensation. (SWBT Brief, p. 49). Under reciprocal compensation, parties are compensated for their costs; under bill-and-keep they are not. (Cadieux Rebuttal, p. 21-23, 40-41). Unless traffic

flows are perfectly balanced, under either compensation method, one party will always have a more advantageous result. Under reciprocal compensation, the party that terminates the most traffic receives a net payment. Under bill-and-keep, that party sustains net unreimbursed costs.

SWBT opposed bill-and-keep during the AT&T arbitration, because it anticipated it would be the party doing most of the terminating. Now it has decided the CLECs will be doing most of the terminating, so it wants to change to bill-and-keep. SWBT essentially forced reciprocal compensation on the CLECs and SWBT has to live with it, regardless of any miscalculation on its part.[5] SWBT is not entitled to a second bite at the apple, at least during the term of existing approved contracts.[6] In fact, SWBT admits that it is inappropriate for companies to be able to switch back and forth between methods to achieve such an advantage. (SWBT Brief, p. 50).

SWBT's assertions and actions show that there is an imbalance in traffic. If there was a balance, SWBT would have no motivation whatsoever to seek to avoid the results of its prior insistence upon reciprocal compensation. Hence, the Commission simply cannot impose bill-and-keep on CLEC-ILEC interconnection relationships. Under 47 CFR 51.713(b), reciprocal compensation is required. The Commission could not legitimately presume a balance of traffic in the face of the contrary evidence provided by SWBT's conduct. See also Section 251(b)(5) and 47 CFR 51.701 et seq.

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[5] SWBT did not provide a full analysis of purported financial impacts of its reciprocal compensation contracts, but rather only provided outlandish extreme examples that do not factor in all revenue flows, such as compensation back from CLECs. (SWBT Brief, p. 51). Specifically, SWBT provided no evidence whatsoever that adherence to existing contracts would pose any threat to it or the MCA Plan. Again, it was SWBT that insisted on reciprocal compensation in the first place. The testimony cited by SWBT, of GTE and Cass County, is not on point, as it concerned adjoining carriers, not interconnected carriers with contracts in place. (SWBT Brief, p. 51-53).

[6] While SWBT can make inter-company compensation the subject of future arbitrations, it would be premature for the Commission to resolve such matters now. Proper notice would be required, and further hearings. Moreover, even if the Commission commenced such a proceeding, it could still face significant limitations under Section 252 of the Act on its ability to disapprove negotiated agreements that did not incorporate the results of such a proceeding.

SWBT professes concern about excess termination rates (Brief, p. 49), but of course the Commission would have to approve any rate SWBT did not voluntarily accept under Section 251 and 252 of the Act.

Contrary to the ILECs' arguments (SWBT Brief, p. 50, MITG Brief, p. 3), Gabriel does not believe that any CLEC proposed that the Commission grant it the unilateral ability to chose between inter-company compensation methods and impose that choice on the ILECs. Rather, the CLECs uniformly indicated that it was possible that in the future they might reach bilateral agreements with ILECs that would be submitted to the Commission for approval. As far as Gabriel knows all CLECs and adjoining ILECs want to continue bill-and-keep and no other arrangements or agreements for exchanging MCA traffic between these carriers are required. (Stowell, Tr. 376, 400; Matzdorff, Tr. 1191-92; Evans, Tr. 1125-26, Cass Brief, p. 9, 15-16, MITG Brief, p. 3).[7]

It is SWBT that seeks to pick and chose between compensation methods, without any criteria besides its own self-serving preferences. SWBT seeks to adhere to the "original" bill-and-keep plan between adjoining carriers, yet add transit fees. SWBT opposes use of reciprocal compensation provisions of interconnection agreements between competing carriers, yet seeks to preserve the transit fees included in such provisions. (SWBT Brief, p. 39-40).

Under the status quo, SWBT already receives transit fees from interconnecting CLECs, as well as other local reciprocal compensation, and does not receive such fees from adjoining ILECs. (Cadieux Direct, p. 46). This is not discriminatory, because of the difference in the relations of competing carriers versus adjoining carriers. There is no basis to change these transit

[7] In response to Commissioner Drainer's question at Tr. 1145, because the parties agree, the Commission does not have jurisdiction to compel a different result under Section 392.240.3, nor does Section 252 of the Telecommunications Act authorize the Commission to commence interconnection agreement arbitration proceedings independent of a request from a carrier. Blocking is unnecessary, given the agreement of the parties, and in any event would be preempted by the FCC in all likelihood.

arrangements and create an admitted windfall for SWBT from the other ILECs. (Hughes Tr. 985-87).

In conclusion, the Commission should not attempt to revise the existing bill-and-keep relationships between LECs operating in adjoining service areas, both CLECs and ILECs, nor should it attempt to revise existing reciprocal compensation provisions of interconnection agreements between CLECs and ILECs operating within the same service areas.

g. Is the compensation sought in the proposed MOU appropriate?

SWBT purports to defend the propriety of its MOU dialing parity/competitive loss surcharge in two short paragraphs, without any citation of authority. (SWBT Brief, p. 56). As with its other arguments, its "defense" rests solely on the proposition that CLECS are not MCA participants. Leaving aside the issue of whether or not CLECs are currently MCA participants (and thus whether or not the MOU surcharge is appropriate today), SWBT provides no explanation whatsoever as to why the surcharge would be appropriate after the Commission reaffirms CLEC participation in the MCA. CLECs should not have to pay for SWBT's cooperative participation in the MCA Plan, any more than other ILECs should have to (and they do not). (Cadieux, Rebuttal, p. 9-12).

In fact, as Staff points out in their Initial Brief, ILECs are prohibited from charging CLECs for ILEC originating traffic. Section 51.703(b) of the FCC's rules expressly prohibits LECs from assessing "charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." SWBT's proposed surcharge violates the express provisions of this FCC regulation.

After the Commission issues its order reaffirming CLEC participation in the MCA, all companies will be competing for the same customers. SWBT witness Hughes admitted that CLEC participation would not affect the demographics of the MCA service area. (Tr. 1027-28).

He also admitted that the ILECs routinely experience fluctuations in MCA subscribership. (Tr. 1028). Obviously, such fluctuations would continue in the future regardless of CLEC participation.

When MCA subscribers change providers from SWBT to CLECs in the future, SWBT will not experience any change in revenues other than the competitive loss of the revenues from the subscriber making the change. If a non-MCA subscriber changes providers, the result is the same. Any fluctuations between non-MCA and MCA subscribership are normal events, whether or not a change in provider happens to occur at the same time, and do not justify any type of revenue replacement or neutrality. (Unruh, Tr. 1111).[8]

The Commission has ordered LECs to participate in the MCA Plan and provide reciprocal toll-free calling scopes. SWBT admits the Commission has authority to do so. (Hughes Tr. 1029). Staff agreed. (Voight Tr. 180).[9] No one opposes the CLECs requests for reaffirmation that they are participants as well. SWBT is not entitled to be compensated for the participation of CLECs beyond the reciprocal compensation provisions of its interconnection agreements. Likewise, CLECs do not propose to (and should not) charge SWBT for providing the reciprocal toll-free calling required by the Commission's Plan.

Under SWBT's own tariffs (i.e. Exhibit 59), SWBT has no authority to impose toll charges on calls to MCA subscribers of any company operating in the identified exchanges. Hence, SWBT seeks compensation from CLECs for charges it cannot even lawfully impose on

[8] Whether or not optional MCA rate additives were set in part to recover "lost toll", which Gabriel, Staff, and others dispute, it would have been toll lost due to the creation of the MCA Plan, not revenues lost to a competitor. Any such toll disappeared in 1992 and need not be "replaced" again. (Unruh, Tr. 1111).

[9] SWBT's contention that CLECs are trying to control its retail offerings is fiction. (SWBT Brief, p. 24). The Commission established the toll-free calling aspects of the MCA Plan and must allow CLECs to participate if the Plan is to continue.

its own subscribers. Once the Commission eliminates SWBT's "concerns" that CLECs are not participants (even if only prospectively), SWBT's argument will evaporate back into the thin air out of which it was pulled.

SWBT is already fully compensated through its retail MCA rates and the reciprocal compensation provisions of its interconnection agreements. Any charge for providing local dialing parity for calls to CLEC MCA subscribers would be unlawful. See 47 CFR 51.207. The Commission has established MCA as local calling, and SWBT must provide such local calling regardless of the identity of the called party's provider, without any extra charge. See also Sections 3(a)(2)(3) and 251(a)(3) of the Act; 47 CFR 51.205-215. (Cadieux Direct, p.18-19, 25; Rebuttal p. 29).[10]

SWBT admits it is not entitled to recover competitive losses. (Hughes Tr. 1025). SWBT previously attempted to impose such a competitive loss surcharge at the onset of competitive 800 service. As in this case, it based that charge on the false assertion that competitors did not have authority to provide the traffic. The PSC initially approved the charge, but it was overturned by the Courts. See 29 Mo. PSC (NS) 220; 29 Mo. PSC (NS) xxxvi; Order, Case No. TR-89-86 (12-7-1988).

Missouri law does not authorize the PSC to allow incumbents to recover losses attributable to competitive market entry. See, e.g., State ex rel. Webb Tri-Sate Gas v. PSC, 452 S.W.2d 586 (Mo. App.1970). In Webb, a natural gas company sought authority to serve the public. Id. at 587. Liquid propane distributors intervened and requested the PSC to impose a requirement that the natural gas company reimburse them for the losses they expected to incur as

[10] In its Initial Brief, at pages 29-21, Gabriel also demonstrated that the MOU surcharge violates Section 251(a)(d), 251(b)(5), 252(d)(2) and 253 of the Act.

a result of the new competition. Id. At 587-88. The PSC refused to impose such a condition on the grounds that it lacked the requisite authority. Id. At 588. The court agreed, stating:

> It does not appear exactly how such a condition could be enforced; and we are cited to no legal authority for such action by the commission. We think the commission properly rejected this contention.

Id. (emphasis added). See also State ex rel. Fee Fee Trunk Sewer v. Litz, 596 SW2d 466, 468 (Mo. App. 1980); Straube v. Bowling Green Gas, 227 SW2d 666 (Mo. 1950)(PSC does not have authority to determine damages or award pecuniary relief). The Commission simply does not have authority to approve SWBT's proposed competitive loss surcharge.

The Commission should prohibit any company, including SWBT, from charging or receiving SWBT's proposed "MOU" compensation. SWBT's proposed "MOU" compensation is an improper "competitive loss surcharge" and "dialing parity surcharge". SWBT is already fully compensated through its retail rates and interconnection agreements and such additional unilateral charges for fulfilling its legal obligations are unjustified and unlawful. Such charges violate the local dialing parity, interconnection, reciprocal compensation, and free market entry provisions of the Telecommunications Act, as well as related rules and decisions of the FCC and this Commission (such as the reciprocal compensation provisions in the approved ATT/SWBT interconnection agreement that Gabriel adopted). Such charges impede the development of local competition in the outer MCA zones by penalizing a CLEC for winning over a customer and by requiring the CLEC to pay more to SWBT than SWBT pays the CLEC for the use of the involved terminating facilities, when the CLEC should not have to pay anything.

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

Gabriel continues to believe that all parties agree the MCA Plan should be retained, and that any modifications should be deferred to another proceeding such as has been requested by

Public Counsel. It is astonishing, given the degree to which SWBT has sabotaged the Plan, that it can glibly assert its continued support of the Plan based on admitted customer preference. (SWBT Brief, p. 60).

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

SWBT erroneously contends that its MOU surcharge, which it proposes as a revenue neutrality" device, does not recover competitive losses. (SWBT Brief, p. 66). SWBT still admits that it is not entitled to recover competitive losses. (SWBT Brief, p. 66; Hughes Tr. 1025). As established in Gabriel's Initial Brief and under issue g. of this Reply Brief, any competitive loss recovery device or dialing parity charge, such as the MOU, would be illegal.

The first fallacy in SWBT's proposal lies in its contention that CLEC participation in the MCA is a new event, qualifying as a "modification' of the Plan that should be addressed under this issue i. As demonstrated by Gabriel, CLEC participation is not a change or modification, but rather the status quo.

The second, independent, fallacy in SWBT's proposal lies in its contention that it sustains "lost toll" in some fashion other than as a result of competition for the customer. It is irrelevant how or why MCA additives were set in the monopoly environment. Even if such additives were set to recover toll lost in 1992 as SWBT contends, that book is closed.

SWBT witness Unruh confirmed that "what happens going forward" since the creation of MCA is irrelevant. (Unruh Tr., 1111). With or without CLEC participation, SWBT experiences fluctuations in MCA subscribership that do not warrant any type of revenue recovery device.

(Hughes Tr. 1028). Hence, any changes by SWBT or CLEC subscribers to or from MCA service are irrelevant.

There are only four scenarios that need to be explored. First, a SWBT MCA subscriber changes providers and keeps MCA. Second, a CLEC MCA subscriber changes providers and keeps MCA. Third, a SWBT non-MCA subscriber changes providers and stays non-MCA. Fourth, a CLEC non-MCA subscriber changes providers and stays non-MCA. While it is possible for a customer to change carriers and change from MCA to non-MCA, or vice versa, at the same time, when such a transaction is broken down into its components, the change in provider fits within the four scenarios outlined, and the change in service is an irrelevant subscribership fluctuation no different then if the service change occurred months or years before or after the change in providers. (Hughes Tr. 1026-27).

Under the first two scenarios, MCA subscribers of all carriers are making toll-free calls to the customer changing providers before and after the change. There is no lost toll. Under the second two scenarios, calls to the subscribers making the change are toll calls before and after, and again there is no lost toll. Neither SWBT nor any other provider is entitled to any compensation. (Cadieux Surrebuttal, p. 22-23).

As discussed under issue g. above, SWBT's tariffs do not authorize it to charge toll for calls to other MCA subscribers, regardless of the identity of the called party's provider. (Exhibit 59). Absent such authority, SWBT certainly cannot claim lost toll. SWBT improperly seeks to impose a charge on CLECs as if they were not MCA participants even after the Commission reaffirms their status as participants.

SWBT also conjures up the fiction that each MCA subscriber alone pays charges that cover all the toll free calling they receive, and that other subscribers do not contribute to such payment. (SWBT Brief, p. 68). There is no evidence of such payments, nor could there be. At

best, SWBT can argue that MCA rates (mandatory and optional) were set, in total, to recover lost toll in the aggregate. (Again, Gabriel and others dispute even that assertion, because the evidence shows that SWBT had a positive revenue windfall from the institution of MCA. (Hughes Tr. 1001-02, Ex 45)). There is no evidence or logical support for SWBT's extrapolated conclusion that each MCA subscriber pays for the amount of toll free calling they receive. Obviously, such calling will vary from subscriber to subscriber. All MCA subscribers, in both the mandatory and optional ties, make flat rate payments, and the only change in revenues SWBT will experience as a result of this case will be competitive losses (net of reciprocal compensation payments).

As Mr. Cadieux explained, SWBT's efforts to portray its MCA surcharge as some type of revenue neutrality mechanism, rather than the competitive loss recovery mechanism that it really is, cannot withstand scrutiny. Mr. Cadieux testified:

> Mr. Hughes' contention that the MCA Surcharge does not constitute revenue recovery for a competitive loss is purely fictitious. The event which triggers SWBT's imposition of the MCA Surcharge is an outer MCA zone customer's decision to switch its dial-tone service from SWBT to a facility-based CLEC – i.e., a competitive loss to SWBT. When the customer makes that decision, SWBT loses the revenue that customer had previously been paying SWBT – the prevailing local exchange rate, including any applicable MCA additive. For purposes of illustration, assume a particular outer MCA zone business customer is paying a $35 per month local exchange rate and a $50 per month MCA additive, for a total of $85 per month. When that customer decides to switch dial-tone service to a facilities-based CLEC, SWBT loses the $85 per month in revenue. That is a competitive loss. That is the event that triggers SWBT's imposition of the MCA Surcharge. When this competitive loss occurs, SWBT's proposition to the CLEC is, "pay me 2.6 cents per minute for all calls from SWBT inner MCA zone customers to your outer MCA zone customer, or we will impose MCA Screening." (Of course, for reasons I and other CLEC witnesses have described in previous testimonies, if SWBT is able to successfully continue MCA Screening, it will be extremely difficult for the CLEC to retain that outer MCA zone customer and in most cases the CLEC would be coerced into paying the MCA surcharge.)
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> ***

> There is no lost toll revenue in the scenario I described above – all of the "lost revenue" is local exchange and MCA additive revenue which SWBT was receiving from the outer MCA zone customer. There would only be lost toll to SWBT if the outer MCA zone customer that switches dial-tone service to a CLEC is a local-only (rather than MCA optional) subscriber. In any event, both the local exchange and toll markets are open to competition, so irrespective of whether particular MCA calls are considered local or toll, and irrespective of how those revenues are recovered currently by SWBT (from the calling party as toll revenue or from the called party in the form of local charges including any MCA additive), the loss of those revenues occasioned by an outer MCA zone customer's decision to switch its dial-tone service from SWBT to a competitor constitutes a competitive loss.

(Cadieux Surrebuttal, p. 22-23). Likewise, on cross-examination, Mr. Hughes was forced to admit that the only loss that occurs when SWBT loses a customer to a CLEC participating fully in the MCA Plan would be a competitive loss. (Tr. 1026-27). Again, he also admitted SWBT is not entitled to recover competitive losses. (Tr. 1025).

In any event, SWBT's proposed MCA surcharge would not be an appropriate means by which to achieve revenue neutrality. As Mr. Cadieux stated:

> It is difficult to conjure up a more directly anti-competitive mechanism than one in which the dominant service provider (in this case, SWBT or other incumbent LEC in a service area within an MCA) levies a surcharge on its new entrant competitors to replace revenues lost as a result of a new entrant's success in the market place – i.e. as a result of the new entrant convincing an outer MCA zone customer to select it as the customer's dial-tone service provider.

(Cadieux Surrebuttal, p. 23). That is why SWBT's proposed surcharge is expressly prohibited by FCC rules. See 47 CFR 51.703(b).

For these reasons, the Commission must reject SWBT's proposed surcharge.

j. Should MCA traffic be tracked and reported, and if so, how?

MCA traffic between adjoining carriers is exchanged on a bill-and-keep basis as discussed under issue f, and no tracking or separate trunking is required. Non-MCA traffic

exchanged between adjoining carriers is handled in accordance with existing access tariffs. No interconnection agreements are needed between such adjoining carriers.

Interconnection agreements are required between competing carriers and such agreements are in place. These agreements thoroughly address trunking arrangements and the tracking and reporting of traffic, are being implemented in good faith, and no change is needed.

The Commission has previously rejected the ILECs' unsubstantiated requests to change tracking and trunking arrangements. See Case No. TO-99-254. Such matters are under consideration again in Case No. TO-99-593 and should be addressed in that case.

Non-MCA traffic is not at issue in this proceeding. Contrary to the rural ILECs' assertions, access tariffs cover such traffic between LECs operating in adjoining exchanges and no interconnection agreements are needed. (Hughes Tr. 1040-41). The parties are working on reporting traffic in good faith. (Tr. 1142, 1159-62, 1179). Gabriel does not object to the MITG's proposed committee (MITG Brief, p. 4), so long as it does not delay immediate cessation of ILEC interference with CLEC participation in the MCA. Unfortunately, MITG proposes such a delay, at least in the offering of other services. The Commission has no such authority to preclude companies from offering services, under Section 253 of the Act or otherwise.

In Case No. TO-00-428 the Commission confirmed that CLEC local traffic, such as MCA, is not subject to access charges, even when more than two carriers are involved. The MITG's arguments are confusing, but they say they want bill-and-keep for MCA traffic, and apparently the rest of their discussions pertain to non-MCA traffic that is outside the scope of this case.

Conclusion

To assure full competitive participation in the MCA by CLECs, five actions are required from the Commission:

Number one, first and foremost, restore the MCA Plan. Require the ILECs to recognize CLECs and their MCA subscribers as participants in the Plan, entitled to the full benefits of the Plan, including eligibility for toll-free calling by subscribers of other CLECs and ILECs in accordance with the Plan as it was conceived by the Commission.

Number two, preserve competitive benefits by allowing CLECs and ILECs to continue to offer greater calling scopes and better prices consistent with the different levels of PSC supervision of CLECs versus ILECs.

Number three, allow existing interconnection agreements to run their course and deal with any intercompany compensation issues between competing interconnected carriers if and when presented under the Telecommunications Act. It is absolutely essential that parties be able to rely on their contracts and the business plans that they have developed in accordance with those contracts.

Number four, allow all adjoining LECs to continue to exchange MCA traffic on a bill-and-keep basis unless and until they mutually agree to another arrangement.

Number five, prohibit Southwestern Bell and the other ILECs from imposing any additional charges on CLECs as a consideration for ILECs complying with the MCA Plan, and deny any and all efforts by the incumbents to collect compensation for their competitive losses. MCA subscribers are entitled to the full benefits of the Plan, regardless of the carrier they select. No carrier is entitled to compensation for a subscriber who elects to choose a new provider, and no carrier is allowed to charge another carrier for originating traffic.

By taking these five steps, the Commission will restore the full benefits of its MCA Plan and it will preserve the benefits of competition for consumers. It is essential to eliminate the obstacles to competition that have been unilaterally erected by SWBT and the other ILECs by their self-serving and fluctuating misinterpretation of their MCA tariffs and dilution of the benefits of the MCA Plan to consumers. The Commission needs to terminate all ILEC anti-competitive screening, blocking and surcharge practices.

Respectfully Submitted,

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CERTIFICATE OF SERVICE BY MAIL

A true and correct copy of the foregoing was served upon the parties identified in the attached service list on this 17 day of July, 2000, by placing same in a postage paid envelope and depositing in the U.S. Mail.

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