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**

PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW OF BIRCH TELECOM OF MISSOURI, INC.

COMES NOW Birch Telecom of Missouri, Inc. ("Birch") and for its Proposed Findings of Fact and Conclusions of Law states as follows:

1. **Are competitive local exchange carriers ("CLECs") currently included in the Metropolitan Calling Area ("MCA") Plan and, if not, should CLECs be permitted/required to participate in the MCA Plan?**

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

Because of the position taken by Southwestern Bell Telephone Company ("SWBT"), however, CLECs are not currently permitted to participate in the MCA Plan. SWBT takes the

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position that, because CLECs were not parties to the Order in Case No. TO-92-306, they are not permitted to participate in the MCA Plan. SWBT, therefore, programs its switches not to recognize CLEC NXXs as MCA NXXs. When a customer in an optional tier that switches its service from an incumbent local exchange carrier (an "ILEC") to a CLEC and receives a CLEC NXX, the customer loses the MCA participant status necessary to receive calls on a toll-free basis from customers that have remained with the ILECs. For commercial customers especially, this provides a heavy disincentive to change to a CLEC provider. CLECs must be permitted to participate in the MCA Plan.

2. **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 intercompany compensation, (c) use of segregated NXXs for MCA service, and (d) price?**

The MCA Plan must be reciprocal among all participants; that is, a call from a Birch MCA customer to a SWBT MCA customer should be treated the same way (toll-free to the customers and MCA reciprocal compensation or bill and keep between the companies) as a call from the SWBT customer to the Birch customer. To preserve the necessary uniformity, the geographic calling scope for all local exchange carriers ("LECs") participating in the MCA Plan should be the same. If a LEC chooses to offer its customers a wider calling scope for toll-free outbound calls, such an offering would not affect any other LEC's MCA service and should be permitted, but the two-way MCA calling scope should be fixed for all LECs.

The default mechanism for intercompany compensation should be bill and keep, but CLECs should be free to negotiate interconnection agreements that set particular rates for intercompany compensation. Permitting CLECs to participate in the MCA Plan should not automatically rescind the negotiated interconnection agreements on MCA reciprocal compensation that exist today.

Segregated NXXs seem, at this point, to be the only practical way to distinguish between MCA and non-MCA subscribers.

As described more fully in Issue 4, below, CLECs should be free to price their MCA services as they see fit. Competition demands that CLECs have this freedom.

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

No.

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

There is a fundamental difference between **competitive** local exchange carriers and **incumbent** local exchange carriers. Until 1996 the ILECs enjoyed an absolute monopoly in their respective service areas. Since the advent of local competition, the large ILECs have faced the beginnings of competition, but they remain in a near-monopoly position and, so, continue to be subject to rate regulation. CLECs, on the other hand, have been classified by the Commission as competitive carriers. By definition, competitive LECs do not have the power to set prices that consumers must pay or choose not to have service; CLECs do not have market power. The freedom to set prices is the hallmark of a competitive LEC. Missouri's legislature has codified this difference between competitive and incumbent LECs in, among other places, RSMo. § 351.245, which applies maximum price regulation only to incumbents. While CLECs are required to submit their tariffs for approval by the Commission, the only CLEC rates that are subject to price-cap regulation are rates for switched access. The Commission should allow all CLECs to participate in the MCA with complete pricing flexibility, subject to the tarriffing requirements.

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

Each LEC be required to submit a verified list of MCA and non-MCA codes to the Commission and to every other LEC involved in the MCA Plan. To the extent a central administrator is required, the administrator should be a third party, unaffiliated in any way with any of the LECs.

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

Intercompany compensation under the MCA Plan should be subject to the interconnection agreements LECs may reach between themselves. The fall-back position for calls between customers of companies without a negotiated interconnection agreement in place should be bill and keep. LECs should be free to reach agreements with one another that set specifically tailored intercompany rates to address situations where bill and keep does not work properly.

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

No. Any per-minute charge assessed by SWBT on CLECs for their right to participate in the MCA Plan is unreasonable on its face.

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

The MCA Plan should be modified to permit CLECs to participate fully. Staff's MCA-2 proposal, or something like it, should be addressed, if at all, in a separate case established for the purpose of modifying the MCA Plan. This case should only make the modifications necessary to allow CLECs to participate in the MCA Plan with complete pricing flexibility and bill and keep intercompany compensation as the fall-back provision in cases where CLECs and ILECs are unable to establish negotiated reciprocal compensation arrangements.

9. **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?**

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

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

When bill and keep is the compensatory mechanism, tracking and recording traffic is unnecessary, so the Commission should not mandate any specific recording systems. Non-MCA traffic that is billed as long-distance traffic is already subject to access tariffs and should not be dealt with in this case.

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

The Commission has the authority under 47 U.S.C. § 252(e) to approve or reject Interconnection Agreements, but that authority does not extend to requiring companies to enter into Interconnection Agreements. CLECs are not presently certificated to compete in exchanges served by small ILECs in the state of Missouri. Until such certificates are granted, the need for direct interconnection is not present. CLECs and small ILECs already have access tariffs in place that govern access charges for long-distance traffic. Furthermore, RSMo. § 392.200.6 requires every telecommunications company operating in Missouri to "receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other telecommunications company with whose facilities a connection may have been made." Even without Interconnection Agreements, CLECs and small ILECs are thus required to terminate one another's traffic. Even if the Commission had the power to order the two sets of companies to enter into Interconnection Agreements with one another, the Commission would not have the authority to order calls to be blocked. Such an order would clearly be in conflict with RSMo §292.200.6

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

The Commission's authority under 47 U.S.C. § 252(e) extends to the approval of Interconnection Agreements before they become operative. That authority does not reach far enough to give the Commission the power to reopen presently operational Interconnection Agreements for the purpose of requiring the renegotiation of certain terms.

WHEREFORE, Birch Telecom of Missouri, Inc. respectfully requests that the Commission accept the foregoing as Birch's Proposed Findings of Fact and Conclusions of Law in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law has been served via U.S. mail, facsimile, or electronically on the persons listed below, on this 17th day of July, 2000.

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