BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the 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

REPLY BRIEF OF INTERVENOR
INTERMEDIA COMMUNICATIONS INC.

INTRODUCTION

Intervenor Intermedia Communications Inc. ("Intermedia") in this Reply Brief will not directly address the initial briefs of the other CLEC parties nor will it attempt to address each and every point upon which Intermedia might disagree with each of the non-CLEC parties. Instead, Intermedia will focus only on the most significant points raised by the non-CLEC parties to which Intermedia believes call for clarification, refutation, or in some instances, concurrence. Intermedia submits the usual caveat that its failure to address any particular point or issue raised by the other parties should not be considered an acquiescence by Intermedia on that particular point or issue. In fact, there seem to be a number of issues raised by some parties-- such as, for example, Southwestern Bell Telephone Company's ("SWBT's") proposed transport/transit compensation, Staff's MCA-2 proposal, and the independent incumbent local exchange company's ongoing billing/records disputes with SWBT--which are more appropriately addressed in another proceeding and which should not divert the Commission's attention from its prompt resolution of this case. For the reasons set forth in Intermedia's Initial Brief, Intermedia again urges the Commission to expedite its final decision in this case

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so that any applications for rehearing can be filed and ruled upon prior to SWBT's unilaterally imposed November 5, 2000 Memorandum of Understanding ("MOU") deadline.

Since the primary focus of the Commission in this case should be on the MCA *customer*, it seems appropriate to begin by responding to the Office of the Public Counsel ("Public Counsel") and to the Staff, followed by Intermedia's reply to the other parties. Intermedia's suggestions for the Commission's findings of fact and conclusions of law have been separately submitted.

I. REPLY TO THE OFFICE OF THE PUBLIC COUNSEL

A. In General

Intermedia shares Public Counsel's frustration at the slow pace of the development of local exchange competition in Missouri and joins with the Public Counsel in supporting the removal of existing barriers to entry.[1] Intermedia agrees that MCA is a "highly prized feature of customers in the metropolitan areas" and that the CLEC's ability to participate and offer MCA service is essential if CLECs are to effectively compete against SWBT or the other incumbent carriers.[2] Intermedia agrees that the Commission's focus in this case should be "on the customer and the tier in which that customer resides" and that the CLEC MCA customer should be able to receive the same MCA service as an MCA customer of an ILEC.[3] It is important that the Commission keep in mind these fundamental precepts which, while perhaps obvious, can easily get overshadowed by some parties' emphasis on other issues in this case.

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[1] Public Counsel Initial Brief, p. 1.

[2] *Id.* at 2.

[3] *Id.* at 4; *see also*, Cass County et al. Initial Brief at 4.

B. Public Counsel's Seven Point Proposal

In its Initial Brief, Public Counsel proposes that the Commission take seven specific actions in this case.[4] Intermedia is already on record in support of the six basic recommendations proposed by AT&T.[5] With a few exceptions, Intermedia also agrees with Public Counsel's seven point proposal, which is summarized below in bold type followed by Intermedia's reply.

1. **Geographic Plan/Not Province of One Company/CLECs Providing Service in MCA Footprint Are Plan Participants.** The Commission should adopt this suggestion, especially the fundamental concept that the MCA is not and should not be the province of any one company. SWBT's ongoing CLEC call screening actions, and in particular its forced imposition of its MOU on Intermedia, shows that SWBT has improperly and unilaterally assumed the role as the MCA Plan's "gatekeeper" and in so doing it has wrongfully usurped the Commission's lawful authority over CLEC participation in the MCA plan. As discussed in its Initial Brief and again below, Intermedia already is an MCA plan participant by virtue of its Commission-approved MCA tariff--a tariff that *mirrors* that of SWBT. Intermedia's tariff became effective on January 22, 2000.

2. **CLEC Customers in Mandatory MCA Zones Should Have the Same Calling Scope as All Other MCA Customers Without An Additional Additive Charge/Charge For Mandatory MCA Automatically Included in CLEC Local Rate Regardless of What That Rate Might Be.** Intermedia currently provides mandatory zone MCA service as part of its

[4] Public Counsel Initial Brief, pp. 3-4.

[5] Ex. 11, Kohly Direct, p. 29, lines 1-4; Tr. p. 570 (Intermedia witness Mellon response to Chair Lumpe).

overall competitive basic local rate. All MCA mandatory zone customers, regardless of which carrier they choose, should be afforded the same MCA calling scope and features (including the return calling feature). The Commission has already determined that MCA service is part of basic local service in the mandatory MCA zones. All calls originating and terminating in the mandatory zones have not been and currently are not toll calls; there can be no lost toll revenue as a result of a customer changing carriers. As such, SWBT should not be permitted to charge (or in Intermedia's case continue to charge) a CLEC an additional 2.6 cents per minute of use for any calls originating and terminating within the MCA-Central, MCA-1 and MCA-2 tiers. SWBT's MOU specifically calls for compensation by the CLEC for all such mandatory zone calls and SWBT has already imposed and continues to attempt to impose its MOU on CLECs as a condition of MCA plan participation. SWBT during the hearing was forced to reverse its unreasonable position on mandatory zone CLEC compensation, at least in part, but it is clear that SWBT will continue to insist on mandatory zone compensation unless and until the Commission clearly orders otherwise.[6]

3. **CLECs Should Have the Option of Offering MCA Service in Optional Tiers At Any Additive Rate Set By the CLEC Provided that Rate Does Not Exceed the ILEC's Optional Zone MCA Additive.** Intermedia agrees that CLECs should have the option of offering MCA service in the optional tiers and that CLECs, *at minimum*, should be permitted

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[6] SWBT Initial Brief, p. 55, footnote 10 actually limits its concession only to the "Principal Zone" although SWBT witness Unruh earlier indicated that CLEC compensation would be inappropriate not only for the Principle Zone, but also the additional mandatory MCA zones MCA-1 and MCA-2. Tr. 1082-1084. In addition, SWBT's concession is only applicable on a "going forward basis", which means that SWBT intends to require Intermedia to pay for **all** mandatory zone calls unless and until the Commission in its order in this case specifically directs SWBT otherwise and overturns and rejects SWBT's MOU. SWBT's witness boldly and unequivocally has stated as much. *Id.*

to have downward pricing flexibility for any optional tier MCA additive and retain total pricing flexibility for its *basic local service* regardless of the customer location. Without such downward pricing flexibility, the customer is denied the benefits of lower prices, which is after all one of the intended customer benefits of competition.

Intermedia suggests that competitive market forces, as a practical matter, will result in a "cap" or ceiling on CLEC additives in the optional MCA tiers, and that as such, there is no need for the Commission *in this proceeding* to mandate any price cap for such CLEC MCA additives. Imposing a price cap on competitive services offered by competitive companies is and should remain the exception, not the rule under Missouri's statutory regulatory scheme. The Commission should be reluctant to impose any such price cap unless clear and convincing evidence of the need for such a cap has been presented through record evidence. The Commission has imposed a price cap ceiling for a service offered by competitive companies in only one other instance and it did so only after a lengthy proceeding which focused primarily on the very need for such a cap.[7] The record evidence in this case does not support the Commission imposing a price cap on CLECs, at least at this time. The record actually shows that Intermedia's currently tariffed MCA optional tier additives are no greater than those of SWBT, and in fact, would have been less than SWBT's had it not been for the imposition of SWBT's MOU.[8]

Intermedia suggests that the best approach to any concern the Commission might have

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[7] *See, In the Matter of the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri*, Case No. TO-99-596.

[8] Ex. 1, Voight Direct, pp. 38-39; Ex. 14, Mellon Rebuttal, p. 11, lines 17-18.

on this issue is to refrain from mandating a CLEC price cap in this proceeding, permit the CLECs to file the necessary tariffs to enable them to offer MCA service, and at the time CLEC *company-specific* tariffs are filed, address the reasonableness of any proposed MCA additive at that time. Under this approach, generic imposition of a price cap not supported by record evidence would be avoided, the Commission would preserve and retain the regulatory flexibility to entertain a company-specific request for an MCA optional tier additive in excess of the existing ILEC rate on a case-by-case basis, and the burden would remain on the CLEC seeking such an additive in its tariff filing to prove that it was reasonable. This approach also has the practical benefit of avoiding additional potential legal disputes now over the propriety of the cap itself while still moving forward on the more fundamental questions at hand. While Intermedia cannot now envision a situation where a CLEC would seek an MCA additive greater than its ILEC competitor, if that did somehow happen the Commission would nevertheless be able to reject it if the CLEC could not at that time prove its company-specific case.

4. **All MCA Customers Within the Same MCA Tier Should Have The Same Calling Scope/No Discrimination or Call Screening Based on the Carrier Should Exist.** The Commission should order SWBT to immediately desist from its discriminatory and anti-competitive MCA call screening practices and its unilateral imposition of its MOU. A customer should be no worse off simply because the customer decides to take service from a competitive carrier.

5. **Price Ceiling for CLECs For MCA Optional Tier Additives/Downward Pricing Flexibility For ILECs for MCA Optional Tier Additives.** Price caps for CLECs is discussed

above. MCA optional tier pricing flexibility for ILECs is discussed in more detail below, but basically Intermedia concurs with the Staff that Missouri statutes provide specific procedures which must be followed before the Commission can grant pricing flexibility for the services offered by incumbent carriers. Incumbent carriers have been and continue to be free to pursue pricing flexibility pursuant to the applicable statutory procedures but they apparently have chosen thus far not to do so. To bypass the applicable statutory procedures by simply granting ILEC pricing flexibility by fiat *in this case* would be both inappropriate and unlawful.

6. **Inter-company Compensation For the Exchange of MCA Traffic Should Remain As Bill and Keep.** To the extent bill and keep is the *current* inter-company compensation mechanism between carriers for the exchange of MCA traffic it should remain so. To the extent SWBT or any other incumbent carrier desires bill and keep for the exchange of MCA traffic, it should take that position when negotiating *new or amended* interconnection agreements with the CLECs and the Commission can, if necessary, deal with the issue when those negotiated interconnection agreements are submitted for Commission approval or for arbitration.[9] Bill and keep likewise is an appropriate default MCA traffic compensation mechanism where a CLEC and an ILEC have not negotiated an interconnection agreement that governs compensation for the exchange of such traffic, as is the case at least currently with independent ILECs and CLEC MCA plan participants.

It is important to point out, however, that the bill and keep compensation mechanism applicable to carriers under the existing MCA plan makes absolutely no provision for SWBT

[9] Intermedia addresses the question of whether the Commission has the authority to override existing Commission-approved interconnection agreements where such agreements provide for reciprocal compensation between the parties in its Initial Brief and also later in this Reply Brief.

or any ILEC to either: a) attempt to charge another carrier 2.6 cents per minute of use (or any other charge) for the return calling feature; or b) maintain and exchange the traffic and billing records that would be required to enable the imposition of such an extra measured charge for MCA traffic. As such, SWBT's MOU is totally at odds with the bill and keep arrangements of the existing MCA plan and should not now be included as a modification to the existing MCA plan. Even the Missouri Independent Telephone Company Group ("MITG") believes that the compensation requirements of SWBT's MOU are inappropriate and that SWBT's MOU is contrary to the existing MCA bill and keep arrangement.[10] Should the Commission find that the existing MCA bill and keep arrangement is appropriate for MCA traffic, it also necessarily must reject SWBT's MOU as being contrary to that arrangement.

7. **CLECs Should Be Able To Offer Expanded Local Calling Beyond the MCA Geographic Footprint But No Obligation For ILEC to Provide Toll Free Return Calling Outside the MCA.** In addition to being able to offer "pure" MCA service within the MCA geographic footprint, CLECs should continue to be permitted to offer additional types of one-way outbound toll-free calling plans. Contrary to some of the allegations made by some parties, Intermedia has never suggested let alone argued that an ILEC should be required to treat non-MCA traffic as anything but toll traffic. In terms of "pure" MCA calls, however, Intermedia agrees with Public Counsel that "[i]f a call to or from a MCA customer in a tier was toll free under the present MCA, it remains so no matter whose customer the MCA customer is or whose customer the return call to a MCA customer is".[11]

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[10] MITG Initial Brief, p. 19.

[11] Public Counsel Initial Brief, p. 5.

II. REPLY TO THE STAFF

A. In General

Intermedia agrees with Staff that "MCA service is an essential part of a customer's local service" and that MCA service "is a minimum service standard for local service in the areas it is offered".[12] The Commission itself has already made these determinations.[13] In terms of allowing competition in local markets, Intermedia wholeheartedly agrees with Staff's contention that "Congress did not envision a situation where an ILEC is able to unilaterally deny its competitors from offering a service" and that the Commission should take steps to prevent ILECs with a 97% market share from continuing to do so.[14] This is, of course, exactly what SWBT has been doing through its MCA CLEC call screening and its anti-competitive, unreasonable and unlawful imposition of its MOU on Intermedia.

B. Inter-company Compensation/MOU/Pricing Flexibility

Intermedia fully agrees with Staff's stated position on inter-company compensation arrangements for purposes of MCA and non-MCA traffic, both as a matter of law and of policy.[15] In addition to the CLECs and Staff, Sprint also agrees that carriers should have the option of entering reciprocal compensation arrangements for MCA traffic other than bill and

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[12] Staff Initial Brief, p. 2.

[13] *See, In the Matter of the Application of Southwestern Bell Telephone Company for Approval of Interconnection Agreement Under the Telecommunications Act of 1996 With Communications Cable-Laying Company, d/b/a/ Dial U.S.*, Case No. TO-99-440, Report and Order, September 6, 1996, p. 6; Ex. 68, MCA Order, pp. 21-22.

[14] Staff Initial Brief, p. 3.

[15] *Id.* at 7-8.

keep if they so choose.[16] Intermedia further wholeheartedly agrees with Staff's analysis that SWBT's MOU is neither legal nor appropriate.[17] Finally, Intermedia agrees with Staff that for customers to benefit from competition, CLECs should continue to have full pricing flexibility and that existing statutory mechanisms exist which *could* allow ILECs pricing flexibility provided the ILECs decide to take advantage of the existing statutory procedures available to them.[18]

Section 392.361 RSMo 1994 allows any telecommunications company to petition the Commission to have its services classified as competitive or transitionally competitive and sets forth the particular procedures which must be followed and the standards which must be met. This statute applies to all ILECs, regardless of whether the ILEC is regulated under price caps or under traditional rate base rate of return regulation. To date, no ILEC has come forth under Section 392.361 RSMo 1994 to have MCA service declared competitive or transitionally competitive and thereby receive the concomitant pricing flexibility for that service. If an ILEC chooses not to file a petition under Section 392.361 RSMo 1994, the ability of the ILEC to otherwise change its rates upward or downward is governed by other statutory procedures. If a traditionally regulated ILEC desires any adjustment to its approved rates it must by statute file a traditional rate case under Section 392.220 RSMo Supp. 1999 and Section 392.230 RSMo 1994. If the ILEC is a price cap company, the ILEC must utilize the procedures

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[16] Sprint Initial Brief, pp. 2-3.

[17] Staff Initial Brief, pp. 8-10. Intermedia discusses this in more detail later in its Reply Brief in response to SWBT.

[18] *Id.* at 11.

mandated by Section 392.245 RSMo Supp. 1999.

These statutes clearly and intentionally establish different regulatory processes and standards under which ILECs (whether price cap and rate of return regulated) and CLECs may change their rates and obtain pricing flexibility for their respective services. If SWBT or any other incumbent LEC truly desires pricing flexibility for any of their services, including MCA, they should follow the procedures set forth by statute and make the appropriate Commission filings rather than try to bypass those statutory procedures in this proceeding based only on vague and broad allegations of "competitive and revenue neutrality" and with no specific record evidence showing that the applicable statutory standards have been met. This is not to say that in the future ILEC pricing flexibility for MCA service may not be appropriate; just that *first* the required statutory procedures must be followed and the applicable statutory standards met.

III. REPLY TO SOUTHWESTERN BELL TELEPHONE COMPANY

A. In General

The underlying premise and justification for SWBT's basic position in this proceeding is found in SWBT's statement that "it is not appropriate for one company, particularly one in competition with another, to seek to control the retail offerings of another company".[19] Intermedia actually agrees with that statement. SWBT's MOU, however, is a prime example of SWBT doing exactly what it says it finds so inappropriate. Through its MOU, SWBT at minimum determined in the first instance whether its competitor Intermedia would be able to

[19] SWBT Initial Brief, p. 24.

even offer MCA service and then SWBT dictated the price Intermedia would charge its own customers for that retail service. By unilaterally screening and blocking CLEC MCA traffic unless and until a CLEC agrees to execute SWBT's MOU, SWBT is not only controlling but actually preventing its competitors from offering a retail service demanded by customers.

Throughout its Initial Brief SWBT attempts to justify its actions and its MOU on the basis that SWBT is not and should not be required to provide return calling to CLEC MCA customers since such customers are not, at least in *SWBT's* view and determination, "MCA *subscribers*". For example, SWBT responds to the allegation that it is violating local dialing parity rules by arguing that the "determination of whether a call is locally dialed depends on whether the called customer is a *subscriber* to the Commission-mandated MCA service, not on the identity of the customer's local service provider".[20] To date, of course, it has been SWBT who unilaterally is determining whether the customer "is a subscriber to the Commission-mandated MCA service". Elsewhere SWBT flatly states that CLEC *customers* located in the optional MCA tiers are not MCA *subscribers*.[21] This manipulation of definitions is bad enough given Public Counsel's general principal that all MCA customers, regardless of carrier, should be afforded the same MCA calling scope and features. It becomes even more blatantly outrageous when actually applied to the unique and specific situation of Intermedia. Despite its own witness admitting at hearing that Intermedia is now a full participant in the MCA plan due to Intermedia's acquiescence to SWBT's MOU,[22] SWBT in an attempt to try to be consistent in

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[20] *Id.* at 20.

[21] *Id.* at 21.

[22] Tr. 1013.

its Initial Brief has backtracked and now is trying to argue that Intermedia is only offering "*MCA-like*" service.[23] This despite the fact that Intermedia's MCA tariff mirrors SWBT's MCA tariff in all respects and despite that it was SWBT who insisted upon these and other conditions under the terms of its MOU.[24] Under SWBT's self-serving approach, even today with Intermedia's Commission-approved MCA tariff (which unquestionably is in fact "pure" MCA) and even though Intermedia is paying SWBT its 2.6 cents per minute compensation, Intermedia's MCA customers are still not being considered MCA subscribers entitled to the full benefits of MCA service, unless of course they leave Intermedia and return to SWBT.

B. Intermedia's Execution Of SWBT's MOU

SWBT on page 54 of its Initial Brief again admits that originally SWBT provided the MCA return calling feature to Intermedia's existing customers who were located within the MCA. SWBT upon discovering its "error," then threatened to change Intermedia's NXX translations to make all return calls to Intermedia's customers toll calls. In order to prevent SWBT from taking this action--which would have resulted in immediate and irreparable damage to Intermedia and its customers--Intermedia had no choice but to eventually agree to the terms of SWBT's MOU.[25] As anticipated, SWBT in its Initial Brief continues to wrongfully characterize Intermedia's eventual acquiescence to the terms of the MOU as being simply the result of voluntary arms length "negotiations" between the parties. There was nothing arms length about this situation; due to the immediate and serious nature of SWBT's

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[23] SWBT Initial Brief, p. 18, footnote 4.

[24] Ex. 1, Voight Direct, pp. 38-39 and Schedule 6 et seq.

[25] Ex. 14, Mellon Rebuttal, pp. 7-8; Ex. 1, Voight Direct, pp. 39-40.

threat there was no time for Intermedia to invoke the dispute resolutions of the Intermedia/SWBT interconnection agreement or otherwise bring the matter before the Commission for resolution. It was difficult enough for Intermedia to pursue "negotiations" with SWBT and respond to customer complaints when during the negotiations SWBT unexpectedly began its switch re-translations, let alone for Intermedia to devote the resources necessary to prepare, file and participate in legal proceedings. If Intermedia had not agreed to execute SWBT's MOU, Intermedia has no doubt that its customers, who had been receiving MCA service, would not be receiving MCA service as of last fall. Of course, that result sadly would have been consistent with what SWBT refers to as its "consistent" treatment of other CLECs.[26]

C. Unlawfulness Of SWBT's MOU

Interestingly, SWBT in its Initial Brief now specifically uses the phrase "proposed MOU" to describe its anti-competitive, self-help cure and future prescription for CLEC participation in the MCA plan. This is interesting because the word "proposed" implies that Commission approval of the MOU is required, much like a "proposed" tariff. SWBT has consistently taken the position, however, that its MOU executed by Intermedia did not require prior Commission approval, and moreover, it has insisted over Intermedia's objections that language to that effect be included in the MOU itself.[27]

Intermedia does not contest SWBT's assertion on page 54 of its Initial Brief that "[t]he Proposed MOU has been filed with the Commission" since it was in fact counsel for

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[26] SWBT Initial Brief, p. 54.

[27] Tr. pp. 571-572.

Intermedia, not SWBT, who actually made the filing after consultation with Staff. According to SWBT, and under the terms of the MOU (which Intermedia was required to follow as a condition for SWBT to allow Intermedia to continue participating in the MCA plan), that filing was "informational" only. However, 47 U.S.C. § 252(e) of the Telecommunications Act requires that all negotiated interconnection agreements be submitted for approval to the state commissions. Likewise, this Commission has always required that any amendments or modifications to an approved interconnection agreement be submitted to the Commission for prior approval. The MOU constitutes an "interconnection agreement" between the two carriers since by its own terms it involves the duty to provide for the transmission and routing of telephone exchange service and exchange access.[28] Prior to and at the time the MOU was executed, Intermedia and SWBT already had on file a Commission-approved interconnection agreement which governed inter-company compensation for the exchange of *all* local traffic between the parties. That agreement stated that "mandatory and optional MCA traffic should be classified as local for the purposes of compensation".[29] The MOU by its terms purports to modify the existing Commission-approved compensation arrangement between SWBT and Intermedia for local traffic. The Commission should rule, pursuant to federal law and prior order of the Commission, that the MOU is unlawful, void and of no effect since it should have been but was not submitted to the Commission in advance for Commission review and approval.

There are, however, additional reasons why the Commission should declare the MOU

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[28] 47 U.S.C. § 251(c)(2)(a).

[29] Ex. 1, Voight Direct, p. 43.

unlawful, void, and of no effect. In several sections of its Initial Brief, SWBT attempts to justify its MOU on the basis that SWBT must be compensated by a CLEC before SWBT can allow its own customers to make toll free calls to CLEC customers within the MCA. SWBT's MOU purports to require Intermedia to pay SWBT 2.6 cents per minute compensation for all calls which originate and terminate within the mandatory MCA zones. There is no dispute that such calls are classified as local traffic and that this Commission has determined that MCA in the mandatory zones are a component of the customers' basic local service. In addition, the SWBT/Intermedia Commission-approved interconnection agreement in effect at the time the MOU was executed further classified both mandatory and *optional* MCA traffic as local traffic. Under federal law, LECs "may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network."[30] This is exactly what the MOU purports to allow SWBT to do, and as such, the Commission should declare the MOU unlawful.

SWBT's MOU also is unlawful not only because it violates the FCC's rules governing reciprocal compensation (see above), it also violates 47 U.S.C. § 251(b)(3) regarding SWBT's duty to provide dialing parity by requiring CLEC customers to use 1+ dialing unless the CLEC agrees to the MOU. Since the MOU has had the practical effect of preventing all but one of the CLECs from offering full blown MCA service, Commission approval or perpetuation of the MOU by adopting the MOU in this case would itself constitute a unlawful

[30] 47 C.F.R. § 51.703(b).

barrier to entry in violation of 47 U.S.C. § 253(b).[31]

D. Unreasonableness Of SWBT's MOU

SWBT's MOU purports to require the payment to SWBT of a 2.6 cents per minute of use charge on "all calls from SWBT's MCA subscribers in Tiers 3-5 and its customers in the Principal Zone and Tiers 1-2" to any Intermedia MCA customer.[32] So that SWBT cannot be accused of "preferential treatment" toward Intermedia, SWBT has offered this same "opportunity" to all other CLECs and is currently asking the Commission to incorporate its MOU into the Commission's order in this case.[33] The mere fact that no other CLEC has jumped at this wonderful "opportunity" is evidence of the unreasonableness of the MOU.

SWBT in its Initial Brief attempts to justify its MOU's 2.6 cents per minute of use charge as follows:

> "To the extent that a CLEC seeks to have calls from SWBT customers to CLEC customers within the MCA be placed on a local basis, compensation is appropriate. *These calls are toll calls and toll charges should apply*; if SWBT is asked to provide the service to its customers without charge, then compensation by the CLEC is appropriate"[34] (emphasis supplied).

SWBT's attempt to justify the imposition of its 2.6 cents per minute charge on calls originating

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[31] Since the Initial Briefs filed by AT&T and Gabriel, among others, discuss these aspects fully Intermedia will not duplicate those same arguments here.

[32] Ex. 1, Voight Direct, Schedule 6-3.

[33] SWBT Initial Brief, pp. 56-57.

[34] *Id.* at 56.

and terminating within the *mandatory* MCA zones on the basis of "lost toll" not only is patently unreasonable, it is totally unsupportable. SWBT can incur no lost toll for calls that never would have been toll calls in the first place. SWBT has been forced to concede this by the time of hearing even if in its Initial Brief it has refused to fully and forthrightly acknowledge it. See Intermedia's previous discussion on this point, *supra,* at pages 3 and 4. This aspect of the MOU in light of SWBT's lack of legitimate justification for it is further evidence of the unreasonableness of the MOU.

Beyond this clearly obvious situation, SWBT's imposition of its 2.6 cents per minute charge generally is nothing more than an attempt by SWBT to unlawfully mitigate its competitive losses while constructing additional barriers to entry for its competitors. This is both unlawful and unreasonable. The Staff and the other CLEC parties have addressed these particular issues in detail in both their testimony and in their initial briefs so Intermedia need not duplicate those arguments here. Regardless of these arguments, the Commission need only compare exactly what SWBT has said with the reality of the terms of SWBT's MOU to find no legitimate evidentiary support for the reasonableness of SWBT's MOU.

SWBT's MOU calls for CLEC compensation for ALL MCA traffic. SWBT, however, in its Initial Brief states that: "[i]t is only the payment, which the optional MCA subscriber made to receive calls on a local basis that is at issue...[o]n those return calls, SWBT is willing to provide the service but only if it is compensated for it...SWBT is not seeking compensation for a competitive loss; it is seeking compensation only where the CLEC want SWBT to

provide a toll-free return calling service to SWBT's customer."[35] SWBT's contradictory evidence, its justification on the one hand, and the terms of the MOU on the next, make the MOU unreasonable.

SWBT's claim that its MOU is necessary because it provides a reasonable mechanism to recoup legitimate lost toll revenues is further undercut by statistics cited by SWBT itself in its Initial Brief. On page 15 of its Initial Brief, SWBT notes that "MCA service is basic local service for 83% of all MCA subscribers; only 17% of the MCA subscribers are optional MCA subscribers".[36] This clearly means that the overwhelming majority of existing MCA subscribers are actually located in the mandatory MCA tiers where MCA is part of the customer's basic local service and that the rates being paid by those customers are not currently generating revenues designed to compensate SWBT for lost toll. SWBT already has agreed that imposition of the 2.6 cents per minute compensation would not be appropriate where a mandatory tier MCA customer switches to a CLEC. If 83% of all existing MCA customers are located within the mandatory zones, the magnitude of SWBT's claim to significant and legitimate lost toll revenues due to CLEC MCA participation quickly subsides. Again, SWBT can incur no lost toll for calls that never would have been toll calls in the first place. The fact that SWBT's MOU nevertheless would impose the 2.6 cents per minute "lost toll recovery mechanism" on ALL calls, even when calls to and from 83% of the existing MCA customers are not currently generating toll revenue to SWBT, makes SWBT's MOU unreasonable.

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[35] Id. at 69.

[36] Citing Staff witness Voight, Tr. 174.

Intermedia suggests, however, that SWBT's claim of lost toll revenues and the need to preserve revenue neutrality--regardless of magnitude or whether it may or may not be legitimately entitled to recoup such losses--is at best an illusory one at present. SWBT cannot *actually* and *currently* be suffering any lost toll revenues due to CLEC provisioning of MCA service since, according to SWBT, no CLEC is even currently able to provide MCA service. To the extent Intermedia is in fact providing MCA service, it purportedly must compensate SWBT for the "privilege" pursuant to the MOU. In any event, SWBT certainly has not presented the Commission in this case any financial or accounting evidence or schedules regarding its revenues nor has it even produced any estimated revenue impact studies based on its predictions and assumptions.

As a matter of sound regulatory policy the Commission in this case should not condition CLEC participation in the MCA plan on some estimated and unsupported additional payment to SWBT nor should CLEC entry be delayed while projected numbers are being crunched or analyses prepared. To do so would be unreasonable. No such additional inter-company compensation payment is required for current MCA plan participants under the existing MCA plan. Making such a drastic modification to the MCA plan at this time is premature and is therefore unreasonable.

There have been some very drastic changes in regulatory law and policy since the original MCA plan was implemented and its rates set in a monopoly environment. The rates collected by the ILECs for MCA service have not changed since 1993 and the Commission has been statutorily precluded from investigating the overall earnings and revenues of at least the price cap ILECs since their last respective traditional rate proceedings. Certainly SWBT's

revenue, expenses, and earnings have changed since the early 1990's. Since at minimum there remains a significant dispute as to whether SWBT even should be entitled to recoup lost toll revenues as a result of CLEC participation in the MCA plan, and since SWBT in this case has presented no real evidence of any actual or projected legitimate revenue loss, the Commission should defer judgment on these issues for some other proceeding designed for that purpose. To rush to judgment on these matters now by way of the Commission's adoption of SWBT's MOU would be unreasonable.

If during the interim SWBT or any other ILEC believes it is entitled to recoup additional revenues above and beyond what it already is collecting in its rates as a result of CLEC participation in the MCA plan, it has the ability at any time to seek rate relief or propose specific rate-related changes to the existing MCA plan under the applicable statutes. To date, no ILEC has felt it necessary to do so. This approach, of course, would require SWBT to affirmatively come forward under the existing statutes with specific and convincing evidence of its claims (rather than make general allegations in this proceeding), which apparently SWBT believes would be unreasonable.

E. ILEC Pricing Flexibility

SWBT in its Initial Brief urges the Commission in this case to require the CLECs to offer MCA service only at the same rates, terms and conditions as allowed for the ILECs. As argued by the Staff, Public Counsel and others, however, adoption of this proposal would mean that customers would be denied the benefits of competition when a CLEC wished to offer the service at a price lower than the ILEC. In response, SWBT offers its alternative proposal that if the CLECs are allowed pricing flexibility then SWBT and the other ILECs should be

granted the same flexibility. SWBT bases this proposal on the notion of insuring "competitive neutrality". The fundamental problem with SWBT's deceptively simple and potentially appealing ILEC pricing flexibility proposal is that it ignores two very significant points. First, there is an enormous difference in market power between incumbent LECs and CLECs. Second, this fundamental difference is recognized in Missouri statutes which clearly prescribe specific procedures to be followed and standards to be met before an ILEC can obtain the same pricing flexibility afforded a CLEC. It would be unlawful and inappropriate for the Commission *in this case* to grant ILECs pricing flexibility for MCA service. *See*, *supra*, at pp. 9-10.

F. "Bill and Keep"

SWBT proposes that the Commission in this case set aside SWBT's existing Commission-approved interconnection agreements with the CLECs and order in lieu thereof a bill and keep compensation arrangement for MCA traffic (different from the bill and keep arrangement under the existing MCA plan) as a condition of CLEC participation in the MCA plan. Intermedia strongly urges the Commission to reject SWBT's proposal and concurs with the arguments set forth by AT&T in its Initial Brief on pages 14-18. To attempt to override existing, Commission approved interconnection agreements in this case would be unlawful and otherwise inappropriate. SWBT has presented no record evidence to show that MCA traffic between itself and a CLEC is presumably balanced, evidence regarding the number of minutes exchanged, or evidence of cost. If SWBT believes that any of the terms of its existing interconnection agreements with a CLEC somehow have become inappropriate, SWBT is not in any way prevented from renegotiating those agreements at any time. The dispute resolution

procedures contained in SWBT's interconnection agreement with Intermedia--which SWBT suggested were appropriate for Intermedia when SWBT threatened its switch re-translations--are equally available to SWBT in this instance. As is the case in terms of SWBT's desire for pricing flexibility, SWBT should follow the procedures set forth by statute that govern the negotiation and arbitration of interconnection agreements rather than attempt to bypass those procedures in this case.

IV. REPLY TO OTHER ILECS

A. Sprint

Intermedia agrees with Sprint that MCA plan participation should be allowed, but not necessarily required, for CLECs.[37] While most CLECs will probably seek to offer MCA service due to competitive market pressures (as was the case with Intermedia), the Commission should not seek to mandate MCA service for CLECs except to the extent that it has already determined that MCA is actually part of basic local service in the mandatory MCA zones pursuant to Section 386.020(4) RSMo 1994. Intermedia also agrees with Sprint that CLECs should be allowed to define their own outbound local calling scope--even if such scope is larger than the MCA geographic footprint--but that in such cases other LECs should not be required to treat return calls beyond the MCA area as local calls.[38] In principle at least, this is no different than SWBT's already approved LATA-wide flat rate Local Plus® service.[39]

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[37] Sprint Initial Brief, p. 2; *see also*, Cass County et al. Initial Brief, p. 7.

[38] Sprint Initial Brief, p. 2.

[39] *See, In the Matter of the Investigation into the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus Service by Interexchange and Facilities-Based Competitive Local Exchange Companies*, Case No. TO-2000-667. SWBT's current provision of Local Plus® service has several striking

Contrary to the characterizations of some parties, Intermedia has never suggested that ILECs should somehow be forced to provide toll free return calling outside of existing MCA plan boundaries nor that CLECs should be exempted from paying otherwise appropriate switched access charges.

B. Cass County et al./MITG

To the extent the independent LECs are suggesting it in this case, Intermedia believes that it would be totally inappropriate to further delay full CLEC participation in the MCA plan simply because Cass County et al.'s and MITG's concerns about third party LEC compensation, billing records, and their ongoing disputes with SWBT in the post-Primary Toll Carrier Plan environment, have yet to be resolved. The same holds true with regard to SWBT's transport (transit) compensation proposal. Aside from the fact that the evidentiary record in this case is insufficient to attempt to resolve these various and complex matters, the Commission currently has pending before it Case No. TO-99-593 which was established to specifically address such issues.[40] That case, not this one, is the appropriate forum for the ultimate resolution of such complex and technical issues. The Commission should move forward in this proceeding to enable CLECs to begin providing MCA service as quickly as possible. If necessary, the Commission could also establish an additional case or cases to investigate, for example, the Staff's MCA-2 or SWBT's transit proposals.

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parallels to this case. Not only have the third party LEC compensation, billing records, and interconnection issues present in this case surfaced in that pending proceeding as well, but there the Commission had previously allowed SWBT (in the interest of its customers) to proceed to offer its service despite the still unresolved issues brought forth by the independent LECs and AT&T.

[40] *See, In the Matter of the Investigation Into Signaling Protocols, Call Records, Trunking Arrangements, and Traffic Measurements*, Case No. TO-99-593.

C. Interconnection Agreements/Third Party ILEC Compensation

MITG's broad legal conclusions regarding the Commission's legal authority in this case to override existing Commission-approved interconnection agreements and to direct CLECs to enter into interconnection agreements with the independent LECs to resolve third party transiting situations are simply incorrect.[41] Intermedia does not contest the basic contention that the Commission has "general regulatory authority" over reciprocal compensation arrangements and interconnection agreements, nor does it contest the statutes cited in support of that basic principle. However, as a matter of federal law the Commission must exercise that authority when it *first reviews* the interconnection agreements--not after the agreements have already been approved and are in effect. It also as a matter of Missouri law must base all its decisions on competent and substantial evidence on the record as a whole. The evidentiary record in this case is insufficient for the Commission to take the actions urged by the independent LECs. In addition, the record evidence required under the applicable FCC rules for the Commission to order bill and keep as opposed to already approved reciprocal compensation (e.g. issues of traffic balance and number of minutes exchanged) probably does not currently yet even exist, let alone exist in the record in this case.

MITG alleges on page 13 of its Initial Brief that "CLECs to date have violated the terms of Commission orders approving interconnection agreements." Intermedia is compelled to respond to this sweeping allegation since it presumably was intended to also apply to Intermedia. Intermedia denies that it has violated any terms of its interconnection agreement

[41] Intermedia's analysis on this issue was presented in its Initial Brief.

with SWBT and notes that the record is totally devoid of any evidence to support MITG's claim with regard to Intermedia. To the extent MITG or any other carrier believes a particular CLEC has violated any order of the Commission, nothing is preventing that carrier from filing a company-specific complaint against that CLEC.

Cass County et al. echoes SWBT by stating that there has been no Commission order that permits CLECs to participate in the MCA plan.[42] At the very least, Intermedia is fully participating in the MCA plan today pursuant to its Commission approved certificate and MCA tariff; even SWBT has agreed that Intermedia is a full participant in the MCA plan. (Tr. 1013). Intermedia also disagrees, in part, with Cass County et al.'s overly broad contention that a "CLEC should be required to enter into an appropriate interconnection agreement with all LECs with whom it seeks to directly connect and/or terminate traffic" when the CLEC is offering expanded one-way calling (or non-MCA service) beyond the MCA geographic footprint.[43] For the reasons already stated in Intermedia's initial brief, a CLEC/independent LEC *interconnection agreement* is only required where the CLEC is certificated to directly compete with and provide service within the exchanges served by the independent LEC. Not distinguishing between interconnection agreements and third party traffic termination agreements has led to great confusion about this issue as has failure to identify whether the traffic at issue is pure MCA traffic or not.

Where the CLEC is **not** directly competing with the independent LEC for basic local service customers, and the LEC is only terminating that CLEC's toll traffic (and vice versa),

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[42] Cass County et al. Initial Brief, p. 7. *Cf.* Nextlink, Initial Brief, p. 5.

[43] Cass County et al. Initial Brief, pp. 7-8.

compensation for the termination of such traffic presumably would be treated just like any other interexchange toll traffic (e.g. switched access tariffs). In the case of termination of pure MCA traffic within the MCA geographic footprint, intercompany compensation between the CLEC and the independent LEC would be either governed by a negotiated traffic termination agreement between the carriers, or if none yet existed, by bill and keep by default. MITG admits that CLEC entry into the MCA plan creates no additional difficulty when the traffic is pure MCA traffic.[44] To the extent the CLEC or the third party independent LEC determine that actual MCA traffic imbalances make bill and keep inappropriate in such circumstances, they should have the opportunity to negotiate a different arrangement under a traffic exchange/termination agreement and will have the financial incentive to do so. This is another good reason for the Commission to avoid imposing bill and keep as the only method of MCA traffic compensation between CLECs and ILECs in this case. If the CLEC at some point in the future then becomes certificated to offer basic local exchange service in direct competition with the ILEC in that ILEC's exchanges, a direct interconnection agreement with the ILEC would first be required and would necessarily have to be negotiated or arbitrated.

Intermedia recognizes the ongoing disputes between the independent LECs and SWBT in the post PTC Plan environment regarding SWBT transiting CLEC traffic to the independent LEC exchanges.[45] In this regard, however, Intermedia notes that such traffic actually can

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[44] MITG Initial Brief, p. 8.

[45] In Intermedia's case at the present time the only independent ILEC which might be affected would be Orchard Farm. Intermedia currently does not directly terminate traffic to Orchard Farm but does terminate traffic to SWBT; Intermedia believes none of its current traffic, however, is being terminated by Orchard Farm. Tr. 564-565.

flow both ways through SWBT's facilities and that the very real possibility exists that the situation may be more of a problem for the facilities-based CLEC than for the independent LEC under a bill and keep arrangement. MITG's witness Stowell testified "[b]ecause mandatory MCA tiers [where CLECs are located] are the target of more calls than the optional tiers [where independent LECs are located] there is more traffic going from the optional tiers to the mandatory tiers than vice versa".[46] If this is in fact the case, it would seem that the CLECs will have more than sufficient incentive to attempt to negotiate traffic termination agreements with the independent LECs. Speculation aside, the Commission should recall that Intermedia witness Mellon provided uncontroverted evidence that Intermedia, for its part at least, was passing 92-99 records with SWBT and that Intermedia did attempt as early as 1997 to begin discussions with Orchard Farms regarding traffic exchange arrangements.[47]

VI. CONCLUSION

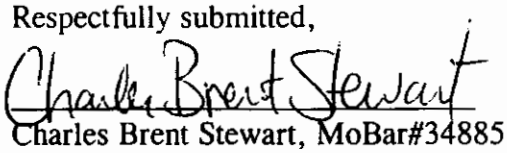
The Commission should reaffirm that CLECs are authorized to participate as full participants in the MCA plan and specifically find that Intermedia has been authorized and has been providing MCA service pursuant to its MCA tariff. The Commission should adopt the Public Counsel's seven point proposal to the extent that it is consistent with AT&T's six recommendations and the Staff's position on inter-company compensation and pricing flexibility. The Commission should defer to a separate proceeding its consideration of Staff's MCA-2 proposal, SWBT's transit proposal, and the various issues raised by the independent LECs relating to inter-company compensation/records exchange/third party traffic in the post-

[46] Ex. 8, Stowell Direct, p. 15, lines 12-14.

[47] Tr. p. 565-566.

Primary Toll Carrier Plan environment. The Commission should find that any Commission-approved interconnection agreements currently in effect should continue to govern inter-company compensation between ILECs and CLECs for all local traffic, but in the absence of same, bill and keep will be the applicable compensation arrangement for all MCA traffic. The Commission should find that SWBT's MOU, both as it relates specifically to Intermedia and as SWBT would have it relate to other CLECs, is unlawful, unreasonable, contrary to the existing MCA plan parameters, and not in the public interest. In rejecting SWBT's MOU, the Commission also should specifically declare the MOU executed by Intermedia as being unlawful as a matter of federal and state law and therefore void and of no effect. Finally, the Commission should issue its final decision in this case as soon as practical so: 1) the Commission's decision is issued prior to SWBT's MOU November 5, 2000 deadline; 2) Intermedia can be relieved of the unreasonable and unlawful obligations unilaterally imposed on it by SWBT as a condition of Intermedia's continued provisioning of MCA service; and 3) so that other CLECs may begin to offer MCA service to Missouri customers as quickly as possible under terms and conditions set not by SWBT but by the Commission.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was sent to counsel for all parties of record in Case No. TO-99-483 by depositing same in the U.S. Mail, first class postage prepaid, or by hand-delivery, this 17th day of July, 2000.

Charles Brent Stewart